Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF OKLAHOMA,

Petitioner,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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April 4, 1995

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QUESTIONS PRESENTED

In 1991 the Secretary of Commerce decided not to make statistically-based adjustments to the 1990 United States census. The court of appeals held that the Secretary's decision was a denial of constitutionally-guaranteed equal protection unless he could demonstrate that the decision was essential to further a legitimate governmental objective. Accordingly, the following questions are presented:

1. Whether the Court of Appeals erred in imposing upon the Secretary of Commerce the heightened burden of showing that the decision furthers a governmental objective that is legitimate and is essential for the achievement of that objective.

2. Whether the opinion of the Court of Appeals is inconsistent with *U.S. Department of Commerce v. Montana*, 503 U.S. 442 (1992), and *Franklin v. Massachusetts*, 505 U.S. ___, 112 S.Ct. 2767 (1992), and in conflict with *Tucker v. U.S. Department of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 407 (1992), and *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1217 (1994).

3. Whether the decision of the Secretary of Commerce is consistent with the mandate of Article I, §2, cl. 3 of the United States Constitution that "[t]he actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct."

LIST OF ALL PARTIES

City of New York
State of New York
City of Los Angeles
City of Chicago
City of Houston
Dade County, Florida
United States Conference of Mayors
National League of Cities
League of United Latin American Citizens
National Association for the Advancement of Colored People
Marcella Maxwell
Donald H. Elliott
John Mack
Olga Morales
Timothy W. Wright, III
Raymond G. Romero
Antonio Gonzales
Athalie Range
Jerry Alan Wood
Carolyn Sue Lopez
City of Atlanta
Maynard Jackson, individually and as the Mayor of the City of Atlanta
Florida House of Representatives
Florida State Conference
Miguel A. De Grandy
Willye Dennis
Mario Diaz-Balart
Dr. Charles Evans
Rodolfo Garcia, Jr.

Bollowy L. "Bo" Johnson
Alfred J. Lawson, Jr.
Willis Logan, Jr.
Johnnie McMillan
Alzo J. Reddick
Peter Rudy Wallace
T. K. Wetherell

Plaintiffs-Appellants

State of Texas
City of Phoenix, Arizona
State of New Jersey
State of Florida
City of Cleveland, Ohio
City of Denver, Colorado
City of Inglewood, California
City of New Orleans, Louisiana
City of Oakland, California
City of Pasadena, California
City of Philadelphia, Pennsylvania
City of San Antonio, Texas
City of San Francisco, California
Broward County, Florida
State of Arizona
City of Baltimore, Maryland
City of Boston, Massachusetts
City of Long Beach, California
City of San Jose, California
Los Angeles County, California
San Bernadino County, California
District of Columbia

Navajo Nation
State of New Mexico
City of Tucson, Arizona
Council of Great City Schools

Intervenors-Plaintiffs-Appellants

United States Department of Commerce
Ronald H. Brown, Esq., as Secretary of the United States Department of Commerce
Michael R. Darby, as Under Secretary for Economic Affairs of the United States Department of Commerce
Bureau of Census
Barbara Everitt Bryant, as Director of Bureau of Census
William J. Clinton, as President of the United States
Donald K. Anderson, as Clerk of the United States House of Representatives
Michael Espy, as Secretary of Agriculture
Donna E. Shalala, as Secretary of Health & Human Services
Henry Cisneros, as Secretary of Housing & Urban Development
Robert B. Reich, as Secretary of Labor
Federico Pena, as Secretary of Transportation
Richard W. Riley, as Secretary of Education

Defendants-Appellees

State of Wisconsin
State of Oklahoma

Intervenors-Defendants-Appellees

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STATE OF OKLAHOMA,

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v.

CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, the State of Oklahoma, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 8, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 34 F.3d 1114 (App. 1). The opinions of the United States District Court for the Eastern District of New York are reported at 822 F. Supp. 906, 739 F. Supp. 761, and 713 F. Supp. 48 (App. 46, 104, and 130, respectively). The decision of the Secretary of Commerce is published at 56 Fed. Reg. 33,582 (App. 146).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 8, 1994. A timely Petition for Rehearing With Suggestion of Rehearing In Banc was filed by Petitioner on September 20, 1994, and denied by Order dated December 12, 1994 (App. 453).[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, clause 1, United States Constitution:

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[1] The petition for rehearing filed by The State of Wisconsin was denied by Order dated January 4, 1995 (App. 449).

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .

Article I, Section 2, clause 3, United States Constitution:

The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; . . .

United States Code, Title 2, section 2(a):

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent

statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. . . .

United States Code, Title 13, section 141:

(a) The Secretary shall, in the year 1980 and every ten years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

United States Code, Title 13, section 195:

Except for the determination of population for purposes of reapportionment of Representatives in Congress among the several States, the Secretary shall, if he considers

it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

STATEMENT OF THE CASE

On November 3, 1988, the City and State of New York, the State of California, and several other cities, public interest groups, and individuals brought this suit to compel the Department of Commerce and the Bureau of the Census to make statistical adjustments to the 1990 United States census in order to reduce the undercount of the population, particularly minorities, anticipated by the plaintiffs. Jurisdiction was based on 28 U.S.C. §§ 1331, 1337, and 1361, as well as 5 U.S.C. § 702. The suit survived an early dismissal motion. *See City of New York v. U.S. Dept. of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989).

In 1991, then-Secretary of Commerce Robert A. Mosbacher issued his decision not to make statistically-based adjustments to the 1990 United States census. 56 Fed. Reg. 33,582. In reaching that conclusion, the Secretary applied guidelines that he had published (55 Fed. Reg. 9,838) following a court-approved stipulation between the parties to this litigation. *See City of New York v. U.S. Dept. of Commerce*, 739 F. Supp. 761, 769 (E.D.N.Y. 1990). The Secretary's decision not to adjust the census enumeration was upheld by the district court on the basis of the administrative record and the additional evidence presented at a lengthy trial. *See City of New York v. U.S. Dept. of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993).

The district court, applying an "arbitrary and capricious" standard under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), determined that the Secretary's decision was reasonable and supported by the record. The court relied, in particular, on the reasonableness of the Secretary's approach of focusing on distributive rather than numeric accuracy -- that is, while statistical adjustment would probably result in greater numeric accuracy for the nation as a whole, adjustment would not assure greater accuracy, and would probably result in greater inaccuracy, at the city or block level, the level at which the greatest effects of adjustment would be felt for intra-state redistricting and allocation of federal funds. 822 F. Supp. at 921-925.

The court of appeals reversed and remanded for further proceedings. 34 F.3d 1114 (2d Cir. 1994). The court determined that the arbitrary-and-capricious standard of review was inappropriate. Instead, the court looked to the reapportionment cases such as *Karcher v. Daggett*, 462 U.S. 725 (1983), to find a constitutional standard of review. Concluding that the equal protection and due process principles of "one person/one vote" required the Department of Commerce to make a good-faith effort to achieve census accuracy "as nearly as practicable," 34 F.3d at 1129, 1131, the court held that the Secretary's decision was subject to heightened scrutiny: Did the decision not to adjust further a legitimate governmental objective and was it essential to the achievement of that objective? 34 F.3d at 1116, 1131.

Judge Timbers dissented from the opinion of the court of appeals. 34 F.3d at 1131-1132. He concluded that the panel decision conflicted with two other circuit decisions,

City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1217 (1994), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S.Ct. 407 (1992), which had earlier rejected challenges to the Secretary's decision.

REASONS FOR GRANTING THE WRIT

The court of appeals adopted a standard of review inconsistent with the principles enunciated in *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992), and *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442 (1992).

The judgment of the court of appeals conflicts with the decisions of two other circuits, *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1217 (1994); and *Tucker v. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S.Ct. 407 (1992).

This case is important to the Nation as a whole. Finality of the 1990 United States census enumeration is undeniably important for a number of reasons. If the judgment of the court of appeals is not reviewed, and the matter is remanded for further proceedings, it will likely be near the end of the decade before the validity of the 1990 census results will be finally determined.

I. The Court of Appeals Adopted a Standard of Review Inconsistent with Precedent from This Court

The court of appeals determined that the decision of the Secretary of Commerce not to adjust the 1990 census results was subject to heightened equal protection scrutiny. The court said that "the federal government, no less than the states, is required to make a good-faith effort to achieve the Constitution's plain objective of equal representation for equal numbers of people." 34 F.3d at 1129. Accordingly, the court held that the Secretary had the burden to show that his decision not to adjust furthered a legitimate governmental objective and was essential to achieve that objective.

This heightened standard of review was derived from the apportionment cases such as *Karcher v. Daggett*, 462 U.S. 725 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); and *Wesberry v. Sanders*, 376 U.S. 1 (1964), in which this Court held that "as nearly as practicable" congressional and state legislative districts had to be mathematically equal in size. The court of appeals viewed the Secretary's decision not to adjust the census statistically to be equivalent to a denial of equal protection with respect to the fundamental right of equality of voting power, for which "[j]udicial standards [of review] are well developed and familiar." 34 F.3d at 1128 (citing *Baker v. Carr*, 369 U.S. 186, 226 (1962)).

The standard of review adopted by the court of appeals imposes a greater burden on the Secretary than required by the Constitution, which provides that the census

be conducted "in such manner as [Congress] shall by Law direct." U.S. const. art. I, § 2, cl. 3. The standard which has been used by this Court in other census cases, and which should have been used by the court of appeals, is whether the Secretary's decision "is consistent with the constitutional language." *Franklin v. Massachusetts*, 112 S.Ct. at 2777 (citing *U.S. Dept. of Commerce v. Montana*, 112 S.Ct. at 1426).[2]

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[2] In *Massachusetts*, this Court upheld the judgment of the Secretary of Commerce because her decision to allocate federal employees temporarily serving overseas, including military, to their "homes of record" in the census enumeration was "*consonant with, though not dictated by*, the text and history of the Constitution." 112 S.Ct. at 2778 (emphasis added).

The Court defined the constitutional standard of review to include whether the Secretary's decision was "consistent with . . . the constitutional goal of equal representation." *Id.* at 2777. The Secretary's allocation decision passed constitutional muster under this part of the test because the Secretary's decision "does not hamper the underlying constitutional goal of equal representation, but . . . actually promotes equality." *Id.* at 2778. Arguably, *Massachusetts*' use of this collateral standard of review addressed a different problem than the court of appeals confronted in this case. *Massachusetts* involved the allocation to a particular state of persons actually counted; the present case involves a proposed statistical adjustment which (based on a not-then-final analysis) would "add over 6 million unidentified people to the census by duplicating the records of people already counted while subtracting over 900,000 people who were actually identified and counted." App. 156. Representational equality is not really the issue here because the court of appeals' primary concern was the Secretary's failure "to achieve numerical accuracy as nearly as practicable," 34 F.3d at 1131, rather than distributive accuracy at the local level. Thus, it can be said, as the court of appeals observed in *Tucker v. Dept. of Commerce*, 958 F.2d 1411, 1418 (7th Cir. 1992), proponents of statistical adjustment "are not asking us to decree [representational] equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census

There can be no doubt the proposition that "as nearly as is practicable one [person's] vote in a congressional election is . . . worth as much as another's," *Wesberry v. Sanders*, 376 U.S. at 8, makes common sense and is morally right. Accordingly, this Court has recognized that "[t]here is some force to the argument that the same historical insights that informed our construction of Article I, § 2 in the context of intrastate districting should apply . . . as well" to questions of Congress' choices of how to conduct and use the data from the decennial census. *U.S. Dept. of Commerce v. Montana*, 112 S.Ct. at 1427.

Nevertheless, this Court has concluded that the principle of equality derived from the *first* clause of Article I, § 2 of the Constitution, relating to selection of representatives "by the People of the several States," does not translate neatly to construction of the *third* clause of Article I, § 2 of the Constitution, which requires that an "actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct." The constitutional constraints that each state must have at least one representative, that each congressman can represent no more than 30,000 people, and that congressional districts cannot cross state lines "inexorably compel[] a significant departure from the [one person/one vote] ideal . . . Accordingly, although 'common sense' supports a test requiring a 'good-

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headcount."

In any event, whether consistency with the goal of equal representation is part of the standard of review or not -- a matter which can be addressed on the merits -- it is clear that the standard of review adopted by the court of appeals is a substantially higher burden than the "consistent with" test of *Massachusetts*.

faith effort to achieve precise mathematical equality' *within* each State [cite omitted], the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole." *U.S. Dept. of Commerce v. Montana*, 112 S.Ct. at 1429.

In determining whether Congress' choices about how the census will be conducted and how the data will be used are constitutional, this Court has said that the "polestar of equal representation does not provide sufficient guidance to [identify] a single constitutionally permissible course. . . [Therefore, Art. I, § 2, cl. 3] delegate[s] to Congress a measure of discretion that is broader than that accorded to the States in the much easier task of determining district sizes within State borders. . . [Congress'] choice . . . commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Ibid.*(footnote omitted).

Likewise, the "polestar of equal representation does not . . . [define] a single, constitutionally permissible course," *ibid.*, for Congress' statutory delegee, the Secretary of Commerce, to follow. Article I, § 2, cl. 3 contains only two constitutional commands: (1) A census shall be conducted every ten years, and (2) the "actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct."

The Secretary met both constitutional commands. The census was conducted in 1990 in the manner specified by Congress, which had by law provided that the Secretary will take a decennial census of population "in such form and

content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a). Congress authorized the Secretary, "if he considers it feasible," to use "the statistical method of 'sampling' in carrying out" his census-related duties "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States." 13 U.S.C. § 195.

Congress has not directed that a statistical adjustment be made to the actual enumeration. Neither did the President, to whom the Secretary reported the unadjusted census count and who, in turn reported to Congress the number of representatives to which each state was entitled pursuant to 2 U.S.C. § 2a, direct as he could have that an adjustment to the actual enumeration be made statistically. Since neither the Secretary's decision nor the President's report is subject to review under the Administrative Procedures Act, and both are subject to review only as to their constitutionality, *Franklin v. Massachusetts*, 112 S.Ct. at 2773-2776, the sole issue is whether the Secretary's decision "is consistent with the constitutional language," *id.* at 2777 (citing *U.S. Dept. of Commerce v. Montana*, 112 S.Ct. at 1426).

Rather than determine whether the Secretary's decision was consistent with the constitutional language, the court of appeals imposed on the Secretary a heightened standard of equal protection review. This is a greater burden on the Secretary than this Court's decisions require, and the judgment of the court of appeals therefore warrants review.

II. The Judgment of the Court of Appeals Is in Conflict With Decisions from Other Circuits

Judge Timbers observed in dissent from the panel decision of the court of appeals that the opinion of the court conflicted with decisions in two other circuits, *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1217 (1994), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 407 (1992). The judgment of the court of appeals should be reviewed to resolve this conflict.

In *Tucker*, the court of appeals held that neither the census statutes nor the Constitution provide a judicially administrable standard by which the decision to adjust or not to adjust the census headcount could be measured. Affirming the dismissal of a complaint to compel federal officials to adjust the census statistically, the court concluded that even a demonstrated undercount or differential undercount in the actual enumeration did not invoke a judicial remedy, not because the issue was nonjusticiable, or because the political question doctrine barred the suit, or because the plaintiffs did not have standing, but because "Article I, section 2, clause 3 does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." 958 F.2d at 1418.[3]

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[3] Although *Tucker* does not speak in terms of the "consistent with the constitutional language" standard of *Franklin v. Massachusetts*, 112 S.Ct. at 2777 -- *Tucker* was decided before *Massachusetts* -- the rationale of the court of appeals' decision is implicitly the same as used by this Court. The court of appeals observed that compelling statistical

The court specifically rejected the idea, embraced by the court of appeals in the present case, that an administrable standard could be found in the reapportionment cases: "Equality of voting power is an administrable standard; . . [However, t]he plaintiffs are not asking us to decree equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount. . . The dispositive consideration in this case is that, though even fine points of statistical methodology can have real consequences, a case about statistical methodology is a case whose gears fail to mesh with any enforceable federal rights." *Id.* at 1418-1419.[4]

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adjustment might have some merit if the "suit were based on a concern with discrimination rather than innocent inaccuracy," 958 F.2d at 1418; but since the undercount about which the plaintiffs there complained "is not the result of an effort to reduce some group's representation or funding but is merely an accident of the census-taking process," *id.* at 1413, there was no departure from the non-specific constitutional directive about how the census should be taken. In other words, no adjustment would be "consistent with the constitutional language" because the Constitution did not contain guidelines for an accurate decennial census that would prescribe otherwise.

[4] The court of appeals did not see the demand for a statistical adjustment to be like apportionment: "Another difference between this case and the reapportionment cases is that the decennial census doesn't count just voters or even just people eligible to vote. In fact the undercount is concentrated among persons who either cannot vote (illegal aliens) or are unlikely to vote (a smaller fraction of poor than of affluent people vote). So this is not a case about depriving anybody of his right to vote or about diluting his voting power. If anything, the undercount enhances the political power of voters relative to that of nonvoters, by making their numbers decisive (or more decisive) in the apportionment of congressional representatives and other political benefits." 958 F.2d at 1418.

In *City of Detroit*, another panel in a different circuit arrived at the same result as *Tucker*. Observing that the plaintiffs' arguments in favor of a statistical adjustment in census figures for all or part of the State of Michigan came "close to arguing that [Article I, § 2, cl. 3 of the Constitution] creates a constitutional right to census accuracy," 4 F.3d at 1375, the court nevertheless concluded that disagreement with the Census Bureau's statistical methodology was not ground for judicial intervention: "Plaintiffs cannot seriously be arguing that a perfectly accurate count of upwards of 250 million people (or nine-plus million in Michigan) was feasible, and nothing in the Constitution compels such an accurate result." *Id.* at 1377. The court, citing *Tucker*, held that a claim for statistical adjustment "invokes no judicially administrable standards." *Id.* at 1378.

The decisions of the Sixth and Seventh Circuits, which both concluded that disagreement with the methodology of the census did not give rise to a constitutional claim, are in conflict with the decision of the court of appeals in this case, that disagreement with the methodology of the census gives rise to an equal protection claim requiring heightened scrutiny of the administrative decision not to adjust the headcount. The judgment of the court of appeals should be reviewed to resolve the conflict.

III. This Case Is of National Importance

The 1980 census spawned over fifty lawsuits, many of which challenged that enumeration on the ground that it

undercounted certain groups. See *Carey v. Klutznick*, 653 F.2d 732, 735 n.10 (2nd Cir. 1981). Despite the efforts of the Census Bureau to develop methods to reduce the undercount, *see generally City of New York v. U.S. Dept. of Commerce*, 822 F. Supp. 906, 913-914 (E.D.N.Y. 1993), the 1990 census in turn spawned this suit and others, not the least of which were the *City of Detroit* and *Tucker* cases and the actions which resulted in the *Massachusetts*[5] and *Montana* decisions from this Court.

Because of this litigation, the 1990 census results remain uncertain, despite the fact that the Secretary of Commerce timely reported the census count to the President, and the President reported to the Congress the number of representatives to which each state was entitled as required by 2 U.S.C. § 2a. *See Commonwealth of Massachusetts v. Mosbacher*, 785 F. Supp. 230, 233 n.1 (D.Mass. 1992).[6] If the judgment of the court of appeals is not reviewed, further proceedings will be conducted in the district court to

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[5] The Court's opinion in *Massachusetts* began with the observation that "[a]s one season follows another, the decennial census has again generated a number of reapportionment controversies." 112 S.Ct. at 2770.

[6] Reversed *sub nom. Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992). As a result of these reports, the number of Representatives to which each state is entitled during this decade has already been fixed, and congressional elections have been conducted in 1992 and 1994 for seats in districts determined by the unadjusted census count. "If the adjusted count indicated by the [Post Enumeration Survey] were adopted, Arizona and California would each gain a seat in the House of Representatives; Wisconsin and Pennsylvania would each lose one seat," 34 F.3d at 1122, and the boundaries of congressional districts in most other states would likely be altered as well.

determine whether the Secretary's decision not to make statistical adjustments to the 1990 census was essential to the achievement of a legitimate governmental objective. Regardless of the district court's determination, further appeals will likely follow. In all probability, it will be approaching the end of the decade -- and another decennial census -- before the 1990 census results are finally determined.[7]

Statisticians agree that the census headcount can be adjusted; they do not agree whether it can be done accurately and fairly, because "'[t]here is no perfect truth as to the size and distribution of the population.'" *City of New York v. U.S. Dept. of Commerce*, 822 F. Supp. 906, 917 (E.D.N.Y. 1993)(quoting Dr. Barbara Bryant, Director of the Census).[8]

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[7] One can envision a nearly endless process of litigation. If, for example, the district court determined that a decision not to adjust did not further a legitimate governmental objective, would it then order an adjustment? And if it did, would not the current Secretary's judgment regarding the method of adjustment and his numerical determinations then face court challenges by the relative "losers" in the process? Or, if the Secretary's decision were upheld under a heightened level of review, would not the district court's judgment again be subjected to appeal? In some respects, *any* finality to the 1990 census adjustment question is difficult to envision, unless this Court determines that the Secretary's decision not to make statistical adjustments is consistent with the Constitution and no further review is required.

[8] Dr. Bryant's truism serves to highlight another problem with the court of appeal's choice of a standard of review. If the "true" population of the nation or any of its subdivisions cannot be precisely determined (because of both inaccuracies in counting and shifts over time in the counted population), what is the legitimate governmental objective to be achieved by a decision regarding adjustment? The court of appeals did not define one, other than to speak generally of representational equality

Courts agree that the census headcount can be adjusted; they do not agree whether the law compels that the effort be made, or what legal standard is to be used to gauge the results. *Cf. City of New York v. U.S. Dept. of Commerce*, 34 F.3d 1114 (2nd Cir. 1994), *with City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir. 1992).

The best hope for finality of the 1990 census results (as well as guidance for the planning of the next decennial census) rests in the review by this Court of the court of appeals' decision in this case. This case is therefore of national importance.

CONCLUSION

The court of appeals held that the Secretary of Commerce's decision not to make statistical adjustments to the 1990 census should have been subjected to heightened judicial review under an equal protection test derived from the apportionment cases. In doing so, the court of appeals adopted a standard inconsistent with the principles enunciated in *Franklin v. Massachusetts* and *U.S. Dept. of Commerce v. Montana*, and in conflict with decisions in two sister

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as nearly as practicable, but if that is the legitimate governmental objective, it seems to be a moving target that no adjustment decision, for or against, could essentially achieve. And, presumably, the courts would be faced with another round of legal challenge to the current Secretary's definition of the governmental objective, even before addressing whether the decision not to adjust would be essential to achieve it.

circuits, *City of Detroit v. Franklin* and *Tucker v. Dept. of Commerce*.

This is a case of national importance because it involves the degree and measure of the judicial role in the census taking process.

For all of these reasons certiorari should be granted so that this Court can define the standard by which courts are to review the constitutionality of the Secretary's decisions about the census, in light of the command of Article I, section 2, clause 3 that the "actual Enumeration shall be made . . .in such Manner as [Congress] shall by Law direct."

The State of Oklahoma respectfully requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF OKLAHOMA,

Petitioner,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 813---August Term, 1993

(Argued: January 5, 1994 Decided: August 8, 1994)

Docket No. 93-6183

CITY OF NEW YORK; STATE OF NEW YORK; CITY OF LOS ANGELES; CITY OF CHICAGO; CITY OF HOUSTON; DADE COUNTY, FLORIDA; UNITED STATES CONFERENCE OF MAYORS; NATIONAL LEAGUE OF CITIES; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; MARCELLA MAXWELL; DONALD H. ELLIOTT; JOHN MACK; OLGA MORALES; TIMOTHY W. WRIGHT, III; RAYMOND G. ROMERO; ANTONIO GONZALES; ATHALIE RANGE; JERRY ALAN WOOD; CAROLYN SUE LOPEZ; CITY OF ATLANTA, GEORGIA; MAYNARD JACKSON, Individually, and as the Mayor of the City of Atlanta; FLORIDA HOUSE OF REPRESENTATIVES; FLORIDA STATE CONFERENCE; MIGUEL A. DE GRANDY; WILLYE DENNIS; MARIO DIAZ-BALART; DR. CHARLES EVANS; RODOLFO GARCIA, JR.; BOLLOWY L. "BO" JOHNSON; ALFRED J. LAWSON, JR.; WILLIS LOGAN, JR.; JOHNNIE

MCMILLAN; ALZO J. REDDICK; PETER RUDY WALLACE; T.K. WETHERELL,

Plaintiffs-Appellants,

STATE OF TEXAS; CITY OF PHOENIX, ARIZONA; STATE OF NEW JERSEY; STATE OF FLORIDA; CITY OF CLEVELAND, OHIO; CITY OF DENVER, COLORADO; CITY OF INGLEWOOD, CALIFORNIA; CITY OF NEW ORLEANS, LOUISIANA; CITY OF OAKLAND, CALIFORNIA; CITY OF PASADENA, CALIFORNIA; CITY OF PHILADELPHIA, PENNSYLVANIA; CITY OF SAN ANTONIO, TEXAS; CITY OF SAN FRANCISCO, CALIFORNIA; BROWARD COUNTY, FLORIDA; STATE OF ARIZONA; CITY OF BALTIMORE, MARYLAND; CITY OF BOSTON, MASSACHUSETTS; CITY OF LONG BEACH, CALIFORNIA; CITY OF SAN JOSE, CALIFORNIA; LOS ANGELES COUNTY, CALIFORNIA; SAN BERNADINO COUNTY, CALIFORNIA; DISTRICT OF COLUMBIA; NAVAJO NATION; STATE OF NEW MEXICO; CITY OF TUCSON, ARIZONA; COUNCIL OF GREAT CITY SCHOOLS,

Intervenors-Plaintiffs-Appellants,

PEOPLE OF THE STATE OF CALIFORNIA EX REL DANIEL E. LUNGREN, ATTORNEY GENERAL,

Plaintiff,

COUNTY OF HUDSON, NEW JERSEY,

Intervenor-Plaintiff,

--v.--

UNITED STATES DEPARTMENT OF COMMERCE; RONALD H. BROWN, ESQ. As Secretary of the United States Department of Commerce; MICHAEL R. DARBY, As Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; BARBARA EVERITT BRYANT, As Director of Bureau of Census; WILLIAM J. CLINTON, As President of the United States; DONALD K. ANDERSON, As Clerk of the United States House of Representatives; MICHAEL ESPY, As Secretary of Agriculture; DONNA E. SHALALA, As Secretary of Health & Human Services; HENRY CISNEROS, As Secretary of Housing & Urban Development; ROBERT B. REICH, As Secretary of Labor; FREDERICO PENA, As Secretary of Transportation; RICHARD W. RILEY, As Secretary of Education,

Defendants-Appellees,

STATE OF WISCONSIN; STATE OF OKLAHOMA,

Intervenors-Defendants-
Appellees.

Before: TIMBERS, KEARSE, and LEVAL, Circuit Judges.

KEARSE, Circuit Judge:

Plaintiffs City of New York *et al.* appeal from a judgment entered in the United States District Court for the Eastern District of New York following a bench trial before Joseph M. McLaughlin, *Judge*,* dismissing their action to compel defendants United States Department of Commerce ("DOC") *et al.* (collectively the "federal defendants") to make statistically-based adjustments to the 1990 United States census in order to rectify acknowledged undercounting of certain minority groups, including African-Americans, Hispanics, Asian-Pacific Islanders, and Native Americans. The district court, applying a standard of review set out in the Administrative Procedure Act, 5 U.S.C. § 706 (1988) ("APA"), *see* 713 F.Supp. 48, 54 (1989), dismissed the complaint on the ground that the decision of the Secretary of Commerce (the "Secretary") not to adjust the census figures was not arbitrary or capricious. *See* 822 F.Supp. 906 (1993). On appeal, plaintiffs contend that, because the constitutional right to equal apportionment of votes depends on having the most accurate census practicable, the district court should not have applied an arbitrary-and-capricious standard of review but should have reviewed the Secretary's decision *de novo*. In opposition, the federal defendants argue that the Secretary's decision not to make a statistical adjustment to the census was entirely immune from judicial review or, at the most, was reviewable only for reasonableness, and that the district court correctly found

---

*Honorable Joseph M. McLaughlin, of the United States Court of Appeals for the Second Circuit, sitting by designation. When the case was initiated, Judge McLaughlin was a Direct Judge in the Eastern District; he became a Circuit Judge in 1990.

that the decision not to adjust was not unreasonable. The States of Wisconsin and Oklahoma, as intervenors-defendants-appellees, argue that the district court's decision should be affirmed on the ground that the Census Act, 13 U.S.C. § 131 *et seq.* (1988), prohibits any statistical adjustment of a census that is used for congressional apportionment.

For the reasons stated below, we conclude that the district court properly held that the Secretary's decision is reviewable and that the Census Act does not prohibit a statistical adjustment of the initial census enumeration; but we conclude that the court should not have reviewed the Secretary's decision under the APA's arbitrary-and-capricious standard of review. We vacate and remand for the court to determine whether the Secretary's decision not to make an adjustment in order to improve the overall count and reduce the disproportionate undercounting of minority groups was essential to the achievement of a legitimate governmental interest.

I. BACKGROUND

The background of this litigation focusing on the 1990 census has been painstakingly explored by the district court in several published opinions, *see City of New York v. United States Department of Commerce*, 713 F.Supp. 48 (E.D.N.Y.1989) ("*NYC v. DOC I*"); *City of New York v. United States Department of Commerce*, 739 F.Supp. 761 (E.D.N.Y.1990) ("*NYC v. DOC II*"); *City of New York v. United States Department of Commerce*, 822 F.Supp. 906 (E.D.N.Y.1993) ("*NYC v. DOC III*"), familiarity with which is assumed. The following description is taken largely from

NYC v. DOC III, which includes the district court's findings after trial.

A. *The Constitutional Requirement of a Decennial Census*

The Constitution of the United States requires a decennial census of the population. *See* Art. I, § 2, cl. 3 (an "actual Enumeration shall be made ... within every ... Term of ten Years"). The Constitution provides that members of the House of Representatives shall be apportioned among the states "according to their respective Numbers." Art. I, § 2, cl. 3; *see also* 14th Amend. § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State...."). The apportionment of Representatives among the states also determines the allocation of votes to the states for the election of the President. *See* Art. II. § 1, cl. 2 ("Each State shall appoint ... a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress....").

In addition to these federal constitutional purposes, the census data are used by the states to draw boundaries for congressional and state legislative districts and are used by local governments to establish districts for other representative bodies such as county legislatures, city councils, and boards of supervisors. Census data are also used to allocate federal and state funding and services. For purposes other than apportionment, Congress has directed that, in addition to the decennial census, there be a mid-decade census. *See* 13 U.S.C. § 141(d).

The Constitution provides that the decennial census shall be conducted "in such Manner as [Congress] shall by

Law direct." Art. I, § 2, cl. 3. The agency designated by Congress to conduct the census is the Bureau of the Census ("Bureau" or "Census Bureau"), an agency within DOC. *See* 13 U.S.C. § 2 (1988).

B. *The Census Bureau's Planned Statistical Adjustment*

Each decennial census has inevitably contained errors, resulting from, *inter alia*, the failures of millions of United States residents to return census forms or be counted by other means, leading to omissions, and the multiple counting of some residents and the listing of nonexistent persons, leading to overcounting. The census thus provides at best only an estimate of the nation's true population. Further, the census has been found to undercount members of ethnic and racial minority groups more severely than members of other demographic groups. This phenomenon, known as the "differential undercount," has skewed every census since at least 1940. The Census Bureau started measuring the differential undercount in that year.

In preparation for the 1980 census, the Bureau hoped that a combination of outreach efforts and attempts to focus energies on improving the count in areas such as inner cities, where the undercount was particularly great, would lead to a reduction of both the overall undercount and the differential undercount. When those efforts failed, the Bureau decided to create a program for the 1990 census that would address the problem though other techniques. By 1984, the Bureau had developed an internal research plan to aid it in deciding whether or not the 1990 census should be statistically adjusted in order to reduce the differential undercount. The Bureau created an Undercount Steering Committee and an Undercount Research Staff to consider the

undercount problem and sought advice from outside experts and organizations such as the American Statistical Association and the National Academy of Science. The Bureau also consulted state and local governments, planned an extensive advertising campaign, designed a more ethnically inclusive census questionnaire, and developed an automated geographical control system to help assure accurate and timely maps and geographic files for the 1990 census.

Based on recommendations of the Undercount Steering Committee, the Undercount Research Staff, and other experts, the Bureau determined that the best tool for adjusting the census would be a "post-enumeration survey" ("PES"). Using a "dual system elimination," also known as "capture/recapture," the original enumeration would be followed by a second measurement, the PES, which would attempt to measure the rate at which people were omitted or erroneously enumerated by the census, in order to determine the net undercount rate. The net undercount rate would indicate the appropriate amount by which the census should be adjusted.

Although the Bureau had used a PES in a number of ways since 1950, it had never used dual system elimination to make a statistical adjustment to a decennial census. The Bureau worked throughout most of the 1980s to hone the PES into an effective tool for census adjustment. For example, an adjustment problem can occur when individuals who have different probabilities of being counted are placed in a single category. This problem was to be reduced by the use of "poststratification," a technique in which highly specific categories are created and all individuals with a similar likelihood of being counted are placed in a specific

category. These categories, or "poststrata," were defined by age, sex, race, Hispanic origin, housing tenure, type of environment (*e.g.*, urban or rural), and geographic region. This categorization resulted in a total of 1,392 exhaustive and mutually-exclusive poststrata. In addition, anomalous results in the PES were to be addressed by statistical "smoothing," a procedure designed to minimize the effects of sampling error by reducing the difference between the results produced by PES sampling and the results that would be obtained if one were able to survey the entire population.

C. *DOC's 1987 Decision, NYC v. DOC I, and the 1989 Stipulation*

By May 1987, the Census Bureau had determined that an adjustment of the 1990 census using a postenumeration survey would be feasible and that the Bureau would undertake to conduct a full-fledged PES in order to be able to correct the census. High-ranking DOC officials, however, promptly decided against any adjustment in the 1990 census, though they instructed Bureau officials not to disclose that decision publicly. On October 30, 1987, DOC publicly announced its decision that the 1990 census would not be statistically adjusted.

The present action was commenced in 1988 by plaintiffs including the cities of New York, Los Angeles, and Chicago, the States of New York and California, Dade County, Florida, the National League of Cities, the League of United Latin American Citizens, the National Association for the Advancement of Colored People, and numerous individuals. The original plaintiffs were eventually joined by intervening plaintiffs that included more than a dozen other cities, the States of Texas, New Jersey, Florida, Arizona,

New Mexico, and the Navajo Nation. Plaintiffs contended that the Secretary's announced decision not to adjust the 1990 census violated their rights under, *inter alia*, the Fifth Amendment. Complaining principally of an anticipated loss of representation and an anticipated deprivation of funds to be distributed under federal programs based on census figures, plaintiffs challenged the methodology to be used in the 1990 census and sought to enjoin the census unless it would be subject to adjustment.

The federal defendants moved to dismiss the complaint, contending that the Secretary's decision was unreviewable. The district court denied that motion, holding that plaintiffs had standing to challenge the census on constitutional grounds. *NYC v. DOC I*, 713 F.Supp. at 52. The court also ruled that it would review the Secretary's decision against adjustment under the arbitrary-and-capricious standard set out in the APA. *Id.* at 54.

In the wake of these decisions, the parties entered into a stipulation dated July 17, 1989 (the "1989 Stipulation"), pursuant to which plaintiffs would withdraw their motion to enjoin the census and DOC would reconsider, in accordance with specified ground-rules, its 1987 decision not to adjust the 1990 census. The principal premises of the 1989 Stipulation were that

> the Secretary of Commerce is vested by law with supervisory authority over the Bureau of the Census and the conduct of the Decennial Census and does not by anything said herein intend to relinquish any authority or decision-making power thereby duly vested in him, including without limitation the

> decision whether or not to adjust the 1990 Decennial Census;

that

> the Secretary of Commerce intends that the 1990 Decennial Census shall be conducted in conformity with all applicable statutory and constitutional requirements ... and in a manner designed to achieve the most accurate population counts practicable;

and that

> the parties hereto at this time believe that the Census, including a post-enumeration survey and other adjustment-related operations, can and will be conducted in a manner that will result in the most accurate counts practicable, and no party has any basis at this time to believe that the Census, including the PES and adjustment-related operations, cannot and will not be conducted in such a manner.

(1989 Stipulation "Whereas" clauses.)

The agreement called for the vacatur of the Secretary's 1987 decision against adjustment of the 1990 census (1989 Stipulation ¶ 2), and required the federal defendants to

> undertake to conduct a [PES] of not fewer than 150,000 households ... and such other procedures or tests as they deem appropriate, as part of the 1990 Decennial Census in a manner calculated to ensure the possibility of using the PES, not solely for

> evaluation purposes, but to produce corrected counts usable for congressional and legislative reapportionment, redistricting, and all other purposes for which the [Bureau] publishes data,

(*id.* ¶ 3). The Stipulation also required a *de novo* reconsideration by the then-new Secretary Robert Mosbacher, "undertaken with an open mind, without any prejudgment, and consistent with the procedures set forth" in the 1989 Stipulation, on "the question of whether or not to carry out a statistical adjustment of the 1990 Decennial Census." (*Id.* ¶ 2.)

The 1989 Stipulation required that the Secretary's assessment of any proposed adjustment be in accordance with a set of published guidelines (the "Guidelines"), to be promptly developed by DOC, "articulating what defendants believe are the relevant technical and nontechnical statistical and policy grounds for decision on whether to adjust the 1990 Decennial Census population counts." (1989 Stipulation ¶ 4.) DOC was also required to appoint and fund a Special Advisory Panel of statistical and demographic experts ("Advisory Panel") to advise the federal defendants with respect to, *inter alia*,

> the application and achievement of the [G]uidelines, ... and plans and schedules for the implementation of the Census and the PES in a manner that will result in the most accurate final census data at the earliest practicable time.

(1989 Stipulation ¶ 7.) If the Secretary eventually decided against an adjustment to the census, his decision was to be accompanied by a "detailed statement of its grounds." (*Id.*

¶ 5.) The 1989 Stipulation was approved by the district court in an order dated July 17, 1989 ("1989 Order").

D. *The DOC Guidelines and NYC v. DOC II*

Following the 1989 Stipulation, DOC appointed an eight-member Advisory Panel, which consisted of four persons selected from a list of seven candidates submitted by plaintiffs, and four members chosen by DOC without input from plaintiffs. DOC proposed and received comments on a set of guidelines, and in March 1990, it promulgated the following final Guidelines:

> 1. The Census shall be considered the most accurate count of the population of the United States, at the national, state, and local level, unless an adjusted count is shown to be more accurate. The criteria for accuracy shall follow accepted statistical practice and shall require the highest level of professional judgment from the [Bureau]. No statistical or inferential procedure may be used as a substitute for the Census. Such procedures may only be used as supplements to the Census.
>
> 2. The 1990 Census may be adjusted if the adjusted counts are consistent and complete across all jurisdictional levels: national, state, local, and census block. The resulting counts must be of sufficient quality and level of detail to be usable for Congressional reapportionment and legislative redistricting, and for all other purposes and at all levels for which census counts are published.

3. The 1990 Census may be adjusted if the estimates generated from the pre- specified procedures that will lead to an adjustment decision are shown to be more accurate than the census enumeration. In particular, these estimates must be shown to be robust to variations in reasonable alternatives to the production procedures, and to variations in the statistical models used to generate the adjusted figures.

4. The decision whether or not to adjust the 1990 Census should take into account the effects such a decision might have on future census efforts.

5. Any adjustment of the 1990 Census may not violate the United States Constitution or Federal statutes.

6. There will be a determination whether to adjust the 1990 Census when sufficient data are available, and when analysis of the data is complete enough to make such a determination. If sufficient data and analysis of the data are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust the 1990 Census.

7. The decision whether or not to adjust the 1990 Census shall take into account the potential disruption of the process of the orderly transfer of political representation likely to be caused by either course of action.

8. The ability to articulate clearly the basis and implications of the decision whether or not to adjust

> shall be a factor in the decision. The general rationale for the decision will be clearly stated. The technical documentation behind the adjustment decision shall be in keeping with professional standards of the statistical community.

See NYC v. DOC II, 739 F.Supp. at 769 (emphasis omitted).

In April 1990, plaintiffs challenged the Guidelines, contending that, in violation of the 1989 Order, they were impermissibly vague and were biased against any adjustment to the 1990 census. Plaintiffs also requested a declaratory judgment that a statistical adjustment to the census would not violate the Constitution or any federal statute. Defendants opposed, contending that any decision by the Secretary on whether or not to adjust the census presented a nonjusticiable political question, and that, in any event, since the Secretary could still elect to adjust the census, plaintiffs' requests were premature.

The district court rejected defendants' contention that these motions presented nonjusticiable issues, and it granted plaintiffs' request for a declaration that statistical adjustment would not of itself violate either the Constitution or the laws of the United States, *see NYC v. DOC II*, 739 F.Supp. at 767. As to the attack on the Guidelines, the court ruled that, while they were vague and while some of them "lend themselves easily to abuse," *id.* at 770, the Guidelines satisfied defendants' obligations under the 1989 Stipulation and were not unduly biased against adjustment, *see id.*

E. *The Implementation and Results of the 1990 Census*

In eventually conducting the 1990 census, the Census Bureau used a four-step process for the initial enumeration. It followed with a PES as required by the 1989 Stipulation.

1. *The Initial Enumeration*

As a first step in the enumeration, the Bureau compiled a list indicating every household in the nation to which the Bureau would send questionnaires. Since the Bureau would rely on the mail return of those questionnaires to count most of the population, an accurate and comprehensive list was vital. In constructing the list, the Bureau relied primarily on commercial mailing lists, supplemented by extensive field research and collaboration with the United States Postal Service. Numerous quality controls were instituted to improve the accuracy of the list.

Step two was the "mail out/mail back" phase, in which census questionnaires were mailed to each housing unit, and members of each household were asked to complete and return the questionnaires to the local census office on or before April 1, 1990 ("Census Day"). The Bureau's efforts to encourage participation in this phase included a general advertising campaign; campaigns specifically directed at African-Americans, Hispanics, Asian-Pacific Islanders, and Native Americans; publication of specialized foreign-language brochures; maintenance of a set of toll-free telephone numbers providing answers in any of eight languages for persons having questions regarding the questionnaire, including one number from which callers could request questionnaires written in Spanish. The Bureau employed different outreach methods in areas where it was

believed that the normal procedure would be particularly ineffective.

The return rate of questionnaires in phase two was only 63 percent. Step three was a follow-up phase. The Bureau sent second mailings to households that had failed to return forms; in census districts with particularly low return rates, it remailed forms to all residents.

In the fourth phase, the Bureau engaged in a further, largely in-person, "nonresponse follow-up" with respect to households that still had not returned questionnaires. Each nonresponding unit was assigned a census enumerator who was to make as many as six attempts to contact a household member to obtain the information necessary to complete a census form. If these efforts proved unproductive, the enumerator would try to obtain basic information on the missing housing unit from a neighbor, building manager, or other reliable source. Once 95 percent of a district's operations were completed, enumerators made one final attempt to visit each remaining nonresponding household to obtain as complete an interview as possible. Then the Bureau implemented "Coverage-Improvement Programs," which included (1) a 100-percent recheck of vacant or uninhabitable units, (2) a "Were you counted?" advertising campaign to reach people who thought they might have been missed by the census, (3) a parolee and probationer check to set the names and Census Day addresses of those people a... add them to the census if they had not already been counted, (4) a housing coverage check, in which the Bureau recanvassed select blocks, and (5) a local government review program, which provided local governments with an opportunity to challenge census counts for their areas. The

Bureau's follow-up efforts in phase four added 5.4 million people, bringing the total count to 249,632,692.

2. *The PES*

The Bureau also implemented the PES. In preparation, the Bureau had selected approximately 5,000 blocks to achieve what it deemed an appropriate sample size for each of the 1,392 poststrata previously developed; in February 1990, Bureau employees had visited each sample block and listed all the housing units they found, identifying approximately 170,000 households.

After the Census Day enumeration, Bureau interviewers returned to each address in the sample blocks to obtain information regarding the residency status of those households on Census Day, and discovered that those blocks contained approximately 400,000 people. The Bureau then compared the data obtained in these visits against the information collected in the original enumeration of the sample blocks. From this comparison, the Bureau estimated rates of omission and rates of erroneous overcounting, and calculated a net rate for each poststratum. The Bureau used these results to develop an "adjustment factor" for each poststratum, *i.e.*, a number which, when multiplied by the population count as indicated by the actual enumeration, would reflect the variations found in the PES. The 1,392 poststrata resulted in 1,392 corresponding adjustment factors.

After the use of statistical "smoothing," the Bureau applied the smoothed adjustment factors to produce adjusted counts down to the block level; these counts were then aggregated to provide population estimates for cities, counties, states, and the nation. The Bureau then

implemented quality-control checks, including more than twenty formal research projects which analyzed potential sources of error within the PES. The results of these studies were then combined in a "total error model," which summarized the overall quality of the PES data.

3. *The Results Shown by the Combined Enumeration and PES*

In the end, estimates drawn from the PES revealed that the enumeration resulted in a national undercount of 2.1 percent, or approximately 5.3 million persons out of a total population of approximately 255 million. As was expected, the undercount was greater for members of racial and ethnic minorities. Hispanics were undercounted by 5.2 percent, Native Americans by 5.0 percent, African-Americans by 4.8 percent, and Asian-Pacific Islanders by 3.1 percent. The PES-calculated undercount for non-African-Americans was 1.7 percent, and for non-Hispanic Whites, 1.2 percent. The impact of the differential undercount was naturally more severe in those areas in which racial and ethnic minorities were more concentrated. If the adjusted count indicated by the PES were adopted, Arizona and California would each gain a seat in the House of Representatives; Wisconsin and Pennsylvania would each lose one seat.

F. *The Secretary's 1991 Decision Not To Adjust*

The Secretary decided not to adjust the 1990 census. The population count reported to the President was thus 249,632,692 rather than 254,902,609 as indicated by the enumeration supplemented by the PES.

The Secretary's decision was issued on July 15, 1991, in a 178-page document entitled "Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population" ("Secretary's 1991 Decision" or "Decision"). Stating that "Blacks appear to have been undercounted in the 1990 census by 4.8%, Hispanics by 5.2%, Asian-Pacific Islanders by 3.1%, and American Indians by 5.0%, while non-Blacks appear to have been undercounted by 1.7%," the Secretary acknowledged that the enumeration "was lower than average among certain segments of our population," but stated that "[i]f we change the counts by a computerized, statistical process, we abandon a two hundred year tradition of how we actually count people." (Secretary's Decision at 1-1.)

Though acknowledging that the PES-indicated adjustment would appear to make the aggregate national count more accurate, reflecting more accurately both the total population of the country and certain racial and ethnic subpopulations of the country (*id.* at 2-1), the Secretary was concerned that with respect to places having populations of less than 100,000 there was no direct evidence that the adjusted counts would be more accurate. He stated that while at the state and local levels the statistical analyses had not been completed, "the total error model" suggested that "the adjusted figures tend to be too high." The Secretary acknowledged, however, that the adjusted figures were "generally closer in numeric terms to the true population than the census counts which tend to be too low." (*Id.* at 2-1.) The Secretary also recognized that up to 2/3 of the population "lives in jurisdictions where the adjusted counts appear more accurate," and that only "one third of the

population lives in areas where the census appears more accurate." (*Id.* at 1-5.) He concluded, however, that "[t]he loss function analysis and hypothesis tests that have been prepared by the Census Bureau to date, although of uncertain reliability, do support the superior accuracy of the census counts versus the adjusted figures when we consider distributive accuracy--or fairness--and use reasonable estimates of the error variance of the alternative" PES-based adjustment. (*Id.* at 2-2.) The Secretary defined "distributive accuracy" as "getting most nearly correct the proportions of people in different areas." (*Id.* at 2-1.) He declined to use the adjustments unless not only numerical accuracy but also distributive accuracy would be increased.

In sum, though conceding that the adjustments would likely bring greater accuracy in the count at the national level, the Secretary expressed the principal concerns (1) that adjustment might not improve distribution of Representatives among the states; (2) that about half of his advisors believed accuracy at the state and local levels would not be improved; and (3) that uncertainty as to the methods of adjustment and assumptions behind them might engender dispute about the accuracy of the census and create the danger that an adjustment might "be made on the basis of research conclusions that may well be reversed in the next several months" (Secretary's 1991 Decision at 1-8). In addition, he expressed the concern that the adjustment process might be subject to manipulation, since the effects of different adjustment methods could be ascertainable in advance; he stated, however, that he was confident that there had been no such manipulation with respect to the 1990 PES.

The Secretary also noted the divergence of views among his advisors. The Advisory Panel split evenly, with

the four members selected from plaintiffs' list recommending adjustment, and the four members chosen solely by DOC recommending against it. The Undercount Steering Committee voted seven to two in favor of adjustment, and both the Under-Secretary of Commerce for Economic Affairs and the Administrator of the Economics and Statistics Administration voted against adjustment. The Director of the Census Bureau, while recognizing that "adjustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree" (Administrative Record, Defendants' Exhibit 1, at 1118), recommended in favor of adjustment.

G. *The Trial and NYC v. DOC III*

Plaintiffs attacked the Secretary's 1991 Decision as a self-serving, post-hoc compilation of documents assembled for the purpose of strengthening DOC's position, and contended that the Secretary's decision was tainted by partisan political influence and violated the Constitution, the APA, and the 1989 Stipulation. After yet another unsuccessful motion by defendants to dismiss the action on nonjusticiability grounds, and after a consolidation of the case with two others presenting identical issues, *City of Atlanta v. Mosbacher*, 92-CV-1566, and *Florida House of Representatives v. Franklin*, 92-CV-2037, a 13-day bench trial was held. The evidence consisted chiefly of the testimony of experts in demographics and statistics, hundreds of exhibits, and numerous deposition transcripts.

Following the trial, the district court entered its findings of fact and conclusions of law. Though it confirmed its earlier ruling that it had the authority to review the Secretary's decision not to adjust the census, because

"'Article I, § 2 requires the census to be as accurate as practicable,'" *NYC v. DOC III*, 822 F.Supp. at 919 (quoting *NYC v. DOC II*, 739 F.Supp. at 767), and though the court found substantial merit in plaintiffs' contentions that the PES-indicated adjustment in the 1990 census was warranted, it rejected plaintiffs' claims and dismissed the complaint on the basis of the standard of review to be applied. *See NYC v. DOC III*, 822 F.Supp. 906.

The court found that "for most purposes the PES resulted in a more accurate--or to be statistically fashionable, a less inaccurate--count than the original census." *NYC v. DOC III*, 822 F.Supp. at 916. Plaintiffs contended that the Secretary's finding of greater distributive accuracy in the loss function analysis was flawed because it was based solely on the larger number of states where greater distributive accuracy was produced by the unadjusted count, without regard for the fact that adjustment produced greater distributive accuracy for the larger percentage of the nation's population; plaintiffs also challenged the rationality of "the Secretary's rejection of numerous loss function analyses performed by the Bureau supporting the superior accuracy of the adjusted counts, and his putative concern with the technical aspects of the PES." The court found that these challenges constituted "a compelling attack on the Decision." *NYC v. DOC III*, 822 F.Supp. at 923 (italics omitted).

However, adhering to its *NYC v. DOC I* ruling that the Secretary's refusal to adjust the census was to be reviewed under the APA's arbitrary-and-capricious standard, the district court concluded that it could not overturn the Secretary's decision. The court stated that

> [t]he conclusion that the Secretary must provide the most accurate census practicable ... does not[ ] lead inexorably to the conclusion that a decision against adjustment is therefore unconstitutional. In deciding whether the Secretary's decision was arbitrary and capricious in light of the requirement that the decision provide the most accurate census practicable, the Court must turn to the Secretary's consideration of the [G]uidelines, which help to illuminate the meaning of both "accuracy" and "practicability."

NYC v. DOC III, 822 F.Supp. at 920. The court reviewed the Secretary's evaluation of the PES-indicated adjustments against each of the eight Guidelines, and found that none of the Guidelines was applied in an arbitrary or capricious manner. For example, the court found that, in applying Guideline One, the Secretary's "decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits." *Id.* a: 924. The district court also found that the Secretary's skepticism concerning the methodology of adjustment was not an inappropriate consideration. *See id.*

The court concluded that

> [p]laintiffs have made a powerful case that discretion would have been more wisely employed in favor of adjustment. Indeed, were this Court called upon to decide this issue *de novo*, I would probably have ordered the adjustment. However, it is not within my province to make such determinations. The question

> is whether the Secretary's decision not to adjust is so beyond the pale of reason as to be arbitrary or capricious. That far I cannot go.

Id. at 928-29 (footnote omitted). The court added that "[w]hile plaintiffs' counsel has illustrated that adjustment is statistically feasible, and would improve the quality of the counts for most purposes while ameliorating the profoundly disturbing problem of differential undercount, the Court cannot, on the record before it, supplant the Secretary's decision." *NYC v. DOC III*, 822 F.Supp. at 931.

This appeal followed.

II. DISCUSSION

On appeal, plaintiffs challenge the district court's use of the arbitrary-and-capricious standard of review and contend that the court should have reviewed the Secretary's Decision *de novo*. While we agree with the district court's rejection of the *de novo* standard, we disagree with its use of the arbitrary-and-capricious standard. For the reasons below, we conclude that, given the concededly greater accuracy of the adjusted count, the Secretary's decision was not entitled to be upheld without a showing by the Secretary that the refusal to adjust the census was essential to the achievement of a legitimate governmental objective.

A. *Statutory Authorization for Statistical Adjustment*

Preliminarily, we reject the contention of intervenors-defendants-appellees, relying on 13 U.S.C. § 195, that any statistical adjustment of the census is barred by

the Census Act (the "Act"). As presently formulated, § 195 of the Act provides as follows:

> *Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States*, the Secretary shall, if he considers it feasible, authorize the use of the statistical method knowing as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195 (1988) (emphasis added). Since any reapportionment of Representatives hinges on the number of persons "as ascertained under the ... decennial census," 2 U.S.C. § 2a(a) (1988), § 195 might appear to preclude the use of sampling in connection with the decennial census, as contrasted with a mid-decade census. However, § 195 must be read in conjunction with § 141 of the Act and in light of the Act's legislative history.

Section 141, as presently formulated, reads as follows:

> The Secretary *shall*, in the year 1980 and every 10 years thereafter, *take a decennial census* of population as of the first day of April of such year, *... in such form and content as he may determine, including the use of sampling procedures and special surveys*.

13 U.S.C. § 141(a) (1988) (emphasis added). Thus, § 141(a) plainly provides for the use of sampling and surveys in connection with the decennial census.

Section 141's provision for sampling was added in 1976. *See* Pub.L. 94-521, 90 Stat. 2459 ("1976 Act"). Previously, that section had made no provision whatever for sampling or special surveys; and while § 195 had mentioned such methods, it did not appear to urge their use. The prior version of § 195 read as follows:

> Except for the determination of population for apportionment purposes, the Secretary *may*, where he deems it *appropriate*, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195 (1970) (emphasis added). In the 1976 Act, the present version of § 195, quoted at the beginning of this section, was adopted in order to strengthen the call for use of sampling. Thus, whereas the pre-1976 version of § 195 provided that statistical sampling "may" be used where "appropriate," the present version provides that such methods "shall" be used where "feasible." The legislative history indicated that, by "if ... feasible" Congress meant "whenever possible":

> Section 10 amends section 195 of title 13, U.S.C., to require that the Secretary of Commerce authorize the use of sampling procedures in carrying out the provisions of this title whenever he deems it feasible, except in the apportionment of the U.S. House of Representatives. This differs from present language which grants the Secretary discretion to use sampling when it is considered appropriate. *This section as amended strengthens congressional intent that, whenever possible, sampling shall be used.*

Report of the Senate Post Office and Civil Service Committee 94-1256 ("S.Rep.") at 6, *reprinted in* 1976 U.S.Code Cong. & Admin. News ("USCCAN") at 5468 (emphasis added). The Senate Report further explained that the 1976 Act inserted the authorizing language in § 141 in order "to encourage the use of sampling and surveys in the taking of the decennial census." S.Rep. at 4, *reprinted in* 1976 USCCAN 5466; *see also* Conf.Rep. No. 94-1719, at 13, *reprinted in* 1976 USCCAN at 5481 (Senate and House of Representatives proposals same with respect to amendment of § 141). In addressing the 1976 Act as a whole, the Senate Report stated that one of "[t]he purposes of this legislation [was] ... to direct the Secretary of Commerce to use sampling and special surveys in lieu of *total* enumeration in the collection of statistical data whenever feasible...." S.Rep. at 1, *reprinted in* 1976 USCCAN at 5463-64 (emphasis added).

Reading §§ 141 and 195 together in light of their legislative history, we conclude that Congress intended the Secretary (a) to conduct an actual enumeration as part of the decennial census, and (b) in lieu of a "total" enumeration, S.Rep. at 1, *reprinted in* 1976 USCCAN at 5464, to use sampling and special surveys "whenever possible," *id.* at 6, *reprinted in* 1976 USCCAN at 5468. Accordingly, we conclude that a statistical adjustment to the initial enumeration is not barred by the Census Act and indeed was meant to be encouraged.

We turn, therefore, to the question of what standard should have been used by the district court in this case in reviewing the Secretary's decision not to adjust the census.

B. *The Standard of Review*

In reasoning that the district court should have applied a standard of review more stringent than the arbitrary-and-capricious test, we begin with a review of Supreme Court decisions in cases involving apportionment and the right to vote, most of which focused on the drawing of voting districts by states. In *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), presented with equal protection challenges to the apportionment of seats for the Tennessee state legislature, the Court rejected the defendants' contentions (a) that apportionment presented a nonjusticiable political issue, and (b) that the plaintiffs had no standing to seek judicial review. *Id.* at 209, 82 S.Ct. at 706. The Court observed that "[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from *dilution by a false tally* ...." *Id.* at 208, 82 S.Ct. at 705 (citing *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) (emphasis ours)).

In *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) ("*Wesberry*"), the Court, reviewing the drawing of congressional districts in Georgia, confirmed that "[t]he right to vote is too important in our free society to be stripped of judicial protection by" an interpretation of Article I that would shield from judicial review state congressional apportionment systems that debase a citizen's right to vote. *Id.* at 7, 84 S.Ct. at 529. Noting that "[t]he history of the Constitution, particularly that part of it relating to the adoption of Art. I, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was

population which was to be the basis of the House of Representatives," 376 U.S. at 8-9, 84 S.Ct. at 530, the *Wesberry* Court held that,

> construed in its historical context, the command of Art. I, § 2, that Representatives be chosen "by the People of the several States" means that *as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's* .... To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention.

376 U.S. at 7-8, 84 S.Ct. at 530 (footnotes omitted) (emphasis added). The Court concluded that

> [w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.

Id. at 18, 84 S.Ct. at 535.

The principles set out in *Wesberry* were further explained in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), which struck down an Alabama

scheme that had resulted in state legislative districts of widely disparate size. The Court noted that

> [t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. *And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.*

Id. at 555, 84 S.Ct. at 1378 (emphasis added). The *Reynolds v. Sims* Court discussed *Wesberry* as follows:

> We determined [in *Wesberry*] that the constitutional test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature for the election of members of the Federal House of Representatives.
>
> In that case we decided that an apportionment of congressional seats which "contracts the value of some votes and expands that of others" is unconstitutional, since "the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote...." We concluded that the *constitutional prescription for election of members of the House of Representatives "by the People," construed in its historical context, "means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."* We further stated:

> "It would defeat the principle solemnly embodied in the Great Compromise--equal representation in the House for equal numbers of people--for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others."

We found further, in *Wesberry*, that "our Constitution's plain objective" was that "of making equal representation for equal numbers of people the fundamental goal...." We concluded by stating:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

Reynolds v. Sims, 377 U.S. at 559-60, 84 S.Ct. at 1380 (emphasis added).

In *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), which involved a drawing of congressional districts in Missouri which resulted in a 1.06 to 1 ratio of the largest district to the smallest, the Court elucidated the *Wesberry/Reynolds v. Sims* as-nearly-as-practicable standard. The Court reject[ed] Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the "as nearly as

practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives," *Wesberry v. Sanders*, *supra*, 376 U.S. at 18, 84 S.Ct. at 535, the "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. See *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the state must justify each variance, no matter how small.

....

Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, the command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.

Clearly, the population variances among the Missouri congressional districts were not unavoidable. Indeed it is not seriously contended that the Missouri Legislature came as close to equality as it might have come.... [I]t is simply

inconceivable that population disparities of the magnitude found in the Missouri plan were unavoidable.

Kirkpatrick v. Preisler, 394 U.S. at 530-32, 89 S.Ct. at 1229.

In *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), the Court confirmed the strictness of this standard when it upheld the invalidation of a New Jersey congressional districting plan where the population of the largest district was less than 1% greater than the population of the smallest. Quoting the *Wesberry/Reynolds v. Sims* "as nearly as practicable" language, 462 U.S. at 730, 103 S.Ct. at 2658, the Court held that deviations could not be sanctioned where, though small, they "were not the result of a good-faith effort to achieve population equality," *id.* at 727, 103 S.Ct. at 2656.

In sum, the Supreme Court has long held that the right to vote is too important to be deprived of judicial protection; that that right is impaired not only by total disenfranchisement but also by dilution, because the Constitution calls for one person's vote to be worth as much as another's as nearly as is practicable; that dilution may result from creating voting districts of different sizes or from "a false tally"; and that, in apportioning legislative seats through districting, a state must make a good-faith effort to achieve the goal of "one-person, one-vote."

The root of the guarantee of "one-person, one-vote" is the Constitution's guarantee to all persons of the equal protection of the law. *See, e.g., New York City Board of Estimate v. Morris*, 489 U.S. 688, 699, 109 S.Ct. 1433, 1441, 103 L.Ed.2d 717 (1989) ("*Reynolds v. Sims* line of

cases" reflects an "equal protection approach"); *id.* at 692, 109 S.Ct. at 1437-38 ("equal protection guarantee of 'one-persor, one-vote'"); *Hadley v. Junior College District*, 397 U.S. 50, 56, 90 S.Ct. 791, 795, 25 L.Ed.2d 45 (1970) ("as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionately equal numbers of officials"); *Baker v. Carr*, 369 U.S. at 209-10, 82 S.Ct. at 706. The equal protection requirement appears explicitly in the Fourteenth Amendment, which applies to the states, and is a component of the Due Process Clause of the Fifth Amendment, which applies to the federal government. *See, e.g., United States Department of Agriculture v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); *id.* at 533 n. 5, 93 S.Ct. at 2825 n. 5 ("'[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process"'" (quoting *Schneider v. Rusk*, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218 (1964))); *Shapiro v. Thompson*, 394 U.S. 618, 641-42, 89 S.Ct. 1322, 1335, 22 L.Ed.2d 600 (1969); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). Because the right to equal apportionment is rooted in the right to equal protection, a court faced with a challenge to the constitutionality of an apportionment system is not called upon to "enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well

developed and familiar," and applicable. *Baker v. Carr*, 369 U.S. at 226, 82 S.Ct. at 715.

Under the familiar judicial standards, a claim of denial of equal protection subjects the challenged governmental act to a degree of scrutiny that depends in part on the nature of the affected right and in part on the nature of the classification. At one end of the spectrum, a program that (a) is social or economic in nature, and (b) is not alleged to discriminate on the basis of inherently suspect classifications or to implicate "fundamental" personal rights, will not be held to violate equal protection principles if it has any rational relationship to a legitimate governmental purpose. *See, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981); *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976) (per curiam). At the other end of the spectrum, a scheme that either (a) impinges on the exercise of a fundamental personal right, or (b) disadvantages a "suspect" class, such as a racial or ethnic group, has traditionally been subject to strict scrutiny to determine whether the scheme is "precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 217, 102 S.Ct. 2382, 2395, 72 L.Ed.2d 786 (1982); *see, e.g., Kramer v. Union Free School District No. 15*, 395 U.S. 621, 627-30, 89 S.Ct. 1886, 1889-91, 23 L.Ed.2d 583 (1969) (right to vote in school district election); *Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S.Ct. 1322, 1333, 22 L.Ed.2d 600 (1969) (right to travel); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942) (right to procreate). In general, if a law alleged to infringe a certain right directly would require a heightened degree of scrutiny, heightened scrutiny should also be given when the law is alleged to

infringe that right discriminatorily. *See Police Department v. Mosley*, 408 U.S. 92, 96, 101-102, 92 S.Ct. 2286, 2293-94, 33 L.Ed.2d 212 (1972); *Eisenbud v. Suffolk County*, 841 F.2d 42, 45-46 (2d Cir.1988).

In the present case both the nature of the right and the nature of the affected classes are factors that traditionally require that the government's action be given heightened scrutiny: the right to have one's vote counted equally is fundamental and constitutionally protected, and the unadjusted census undercount disproportionately disadvantages certain identifiable minority groups. Inaccuracies in the decennial census affect both the distribution of Representatives among states and the distribution of Representatives within most states, since states use the census figures in drawing district lines. Though the differential undercount has been noted, *see, e.g., Karcher v. Daggett*, 462 U.S. at 737 n. 9, 103 S.Ct. at 2662 n. 9 ("the rate of undercount in the census for black population on a nationwide basis is significantly higher than the rate of undercount for white population"), that disparate effect has been tolerated in the past only because the census figures were considered to be "the 'best population data available,'" *see id.* at 738, 103 S.Ct. at 2662 (quoting *Kirkpatrick v. Preisler*, 394 U.S. at 528, 89 S.Ct. at 1227). Here, however, the district court implicitly found that the census did not achieve equality of voting power as nearly as practicable. It found that the PES-indicated statistical adjustment was feasible; that for most purposes and for most of the population that adjustment would result in a more accurate count than the original census; and that the adjustment would lessen the disproportionate undercounting of minorities. Equal protection analysis requires that heightened scrutiny be given to the Secretary's decision to

adhere to an acknowledged undercount that concededly impacts minority groups more severely than nonminority groups. Governmental action that disproportionately denies representation on the basis of race or ethnicity cannot be upheld solely on the basis that the action was "not so far beyond the pale of reason as to be arbitrary or capricious," *NYC v. DOC III*, 822 F.Supp. at 929.

There are, of course, differences between the present case and the *Wesberry/Reynolds v. Sims* line of cases because the present case focuses not on action by a state within its boundaries but rather on federal action that is nationwide in scope. One difference is the result of institutional factors. When the defendant is a state entity, the Supremacy Clause of the Constitution, Art. VI, cl. 2, is applicable, and federal law prevails. When the defendant is the federal government, the Supremacy Clause does not come into play, and a court must give effect to the principle of separation of powers. *See, e.g., Department of Commerce v. Montana*, --- U.S. ----, ----, 112 S.Ct. 1415, 1426, 118 L.Ed.2d 87 (1992) ("*DOC v. Montana*"). In our view, the latter factor means that, except with respect to questions of law, a court generally should not review decisions of the Executive Branch under a *de novo* standard.

A second difference between cases involving state actors and those involving federal actors is the result of constraints that are in part geographical. While it may be possible for a state to achieve equality of population in its congressional election districts, efforts toward such a goal nationwide are constrained by three constitutional requirements: (1) that each state be allotted at least one Representative, (2) that the number of Representatives not exceed one for every 30,000 persons, and (3) that

congressional election districts not cross state boundaries. Given these constraints, the goal of precise equality in voting power is "illusory for the Nation as a whole." *DOC v. Montana*, --- U.S. at ----, 112 S.Ct. at 1429. That the goal of precise equality cannot be achieved nationwide on account of those constraints, however, does not relieve the federal government of the obligation to make a good-faith effort to achieve voting-power equality "as nearly as is practicable." *See id.* at ---- - ----, 112 S.Ct. at 1426-29 (relying on *Wesberry/Reynolds v. Sims* line of cases and applying good-faith test in challenge to federal apportionment legislation); *Franklin v. Massachusetts*, --- U.S. ----, ----, 112 S.Ct. 2767, 2777, 120 L.Ed.2d 636 (1992) (reviewing merits of census claim to "determin[e] whether the Secretary's [judgment in allocating overseas military personnel among states] is consistent with the constitutional language and the constitutional goal of equal representation" (citing *DOC v. Montana*)). We conclude that the federal government, no less than the states, is required to make a good-faith effort to achieve the Constitution's plain objective of equal representation for equal numbers of people. The impossibility of achieving precise mathematical equality is no excuse for not making this mandated good-faith effort.

C. *Burdens of Proof*

Although for most types of equal protection claims, a plaintiff must show that the government's discrimination was intentional, *see, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66, 97 S.Ct. 555, 563-64, 50 L.Ed.2d 450 (1977) (housing); *Washington v. Davis*, 426 U.S. 229, 239-45, 96 S.Ct. 2040, 2047-50, 48 L.Ed.2d 597 (1976) (employment), the Supreme Court has not imposed such a requirement in

any of the cases involving apportionment. As the Seventh Circuit noted in *Tucker v. United States Department of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, --- U.S. ----, 113 S.Ct. 407, 121 L.Ed.2d 332 (1992), cases such as *Reynolds v. Sims*

> do not place on plaintiffs any burden of proving that a malapportionment represents a deliberate effort to dilute some group's voting power. It is enough that the state's electoral districts are malapportioned. We assume that those cases survive the later ones, such as *Washington v. Davis*, *supra*, that require proof of intentional discrimination. The purpose of *that* requirement is to prevent the concept of equal protection from being used to invalidate governmental policies that just happen to bear more heavily against a vulnerable group, whereas the reapportionment cases vindicate a right that the Supreme Court has found to be implicit in the Constitution to an apportionment mechanism that will, so far as possible give each person's vote the same weight in an election. A state's failure to create the required mechanism is an intentional denial of the right to an equally weighted vote.

958 F.2d at 1414 (emphasis in original). Rather, the Supreme Court has held that the burden of a plaintiff asserting an apportionment claim is simply to show that the governmental entity failed to make a good-faith effort to achieve equal districts as nearly as practicable. Thus, in *Karcher v. Daggett*, the Court stated the principal issue as

> whether the population differences among districts could have been reduced or eliminated altogether by

> a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

462 U.S. at 730-31, 103 S.Ct. at 2658. Once the plaintiff shows that a scheme was not the product of a good-faith effort to achieve equality, "the burden shift[s] to the [governmental entity] to prove that the population deviations in its plan were *necessary* to achieve some legitimate state objective." *Id.* at 740, 103 S.Ct. at 2663 (emphasis added); *see also Kirkpatrick v. Preisler*, 394 U.S. at 532, 89 S.Ct. at 1229-30 (state did not carry its burden of showing that disparity was "unavoidable"); *Reynolds v. Sims*, 377 U.S. at 560, 84 S.Ct. at 1381 (Constitution prohibits "'unnecessar[ ]ly'" abridgement of right to vote (quoting *Wesberry*, 376 U.S. at 18, 84 S.Ct. at 535)).

In those cases in which a plaintiff is required to show that discrimination was intentional, the requisite intent may be inferred from such factors as "the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another," *Washington v. Davis*, 426 U.S. at 242, 96 S.Ct. at 2049, or from the historical background of the decision, *see, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. at 267-68, 97 S.Ct. at 564-65, or from the

foreseeability of discriminatory effects, *see, e.g., Columbus Board of Education v. Penick*, 443 U.S. 449, 465, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1979). The government's "[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance,'" is a factor that may be taken into account in determining whether acts were undertaken with discriminatory intent. *Id.* The same types of evidence may support an inference that the discrimination resulted from the lack of a good-faith effort to achieve equality as nearly as practicable.

In the present case, the findings of the district court, set out principally in Part I.G. above, plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable. Those findings are supported by, *inter alia*, the Secretary's acknowledgement that the PES-indicated adjustments would likely not only make the census more accurate nationally, but would also reduce the disparate impact of the census' inaccuracies on minority groups, and that he gave other factors priority over achievement of greater accuracy. For example, he stated that he valued "distributive accuracy" over numerical accuracy; and in stating that an adjustment would not be made because it would not result in *greater* distributive accuracy, the Secretary revealed that he would decline to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate. The Secretary also stated that he felt that eliminating the possibility of manipulation of statistical

surveys in the future was more important than using the admittedly unmanipulated 1990 PES to achieve a more accurate overall count; and that he believed that the use of statistics (notwithstanding Congress's expressed intent to encourage such use) was undesirable because it might reduce state cooperation in the actual enumeration phase of future censuses. He adopted presumptions against any adjustment to the census, stating that greater accuracy at the national level would not lead him to make an adjustment unless it were "convincingly" shown to be not just as accurate, but "more accurate" at every other level as well. (*See, e.g.*, Secretary's Decision at 2-5.)

The inference that the Secretary did not make the required good-faith effort is also supported by the fact that the differential undercount in the 1990 enumeration was plainly foreseeable and foreseen. In the 1940 census and in every census since, members of ethnic and racial minority groups had been undercounted more severely than members of other demographic groups; and the Census Bureau had noted those disproportionate undercounts. Though the Bureau set out to design a program to lessen that effect for the 1990 census, the Secretary initially decided in 1987 that no adjustment would be made; and after the proceedings in this case led to the withdrawal of that decision, the Secretary again decided in 1991 that no adjustment would be made, notwithstanding his acknowledgements that it was generally agreed that at the national level the adjustments would result in greater accuracy, that half of his advisors apparently believed that the adjustments would not reduce accuracy even at regional or local levels, and that a PES-adjusted count appeared to be more accurate in areas encompassing up to two-thirds of the national population.

In sum, we conclude that plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable, and that the burden thus shifted to the Secretary to justify his decision not to adjust the census in a way that the court found would for most purposes be more accurate and would lessen the disproportionate counting of minorities. The Secretary's decision not to make that adjustment is subject to scrutiny not under an arbitrary-and-capricious standard of review but rather under the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity. While precise equality is a goal that at the national level may be illusory, there must be a good-faith effort to approach that goal as nearly as is practicable, and the substantive question becomes what choice should be made among imperfect alternatives. When the official answer is that it is preferable to undercount minorities, that answer must be supported by an official showing that that result (a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective.

CONCLUSION

We have considered all of defendants' arguments in support of the judgment dismissing the complaint and have found them to be without merit. The judgment is vacated, and the matter is remanded for further proceedings not inconsistent with this opinion.

TIMBERS, Senior Circuit Judge, dissenting:

I would affirm on the excellent, comprehensive opinion of Judge McLaughlin reported at 822 F.Supp. 906

(E.D.N.Y.1993). From the majority's refusal to do so, I respectfully but emphatically dissent.

The only two other circuits that have ruled on this issue have agreed with Judge McLaughlin. *City of Detroit v. Franklin*, 4 F.3d 1367 (6 Cir.1993), *cert. denied*, --- U.S. ----, 114 S.Ct. 1217, 127 L.Ed.2d 563 (1994); *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7 Cir.), *cert. denied*, --- U.S. ----, 113 S.Ct. 407, 121 L.Ed.2d 332 (1992). The majority decision in the instant case is the only contrary one. Thus it creates a conflict among the circuits.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THE CITY OF NEW YORK,
THE STATE OF NEW YORK,
THE PEOPLE OF THE STATE OF
CALIFORNIA EX REL. DANIEL E.
LUNGREN, ATTORNEY GENERAL,
THE CITY OF LOS ANGELES,
THE CITY OF CHICAGO,
DADE COUNTY, FLORIDA,
THE U.S. CONFERENCE OF MAYORS,
THE NATIONAL LEGUE OF CITIES,
THE LEAGUE OF UNITED LATIN
AMERICAN CITIZENS,
THE NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
MARCELLA MAXWELL,
DONALD H. ELLIOTT,
JOHN MACK,
OLGA MORALES,
TIMOTHY W. WRIGHT III,
RAYMOND G. ROMERO,
ANTONIO GONZALES, and
ATHALIE RANGE,

Plaintiffs, and

THE STATE OF TEXAS,
THE CITY OF PHOENIX, ARIZONA,
THE STATE OF NEW JERSEY,
THE STATE OF FLORIDA,
THE CITY OF CLEVELAND, OHIO,
THE CITY OF DENVER, COLORADO,

THE CITY OF INGLEWOOD, CALIFORNIA,
THE CITY OF NEW ORLEANS, LOUISIANA,
THE CITY OF OAKLAND, CALIFORNIA,
THE CITY OF PASADENA, CALIFORNIA,
THE CITY OF PHILADELPHIA, PENNSYLVANIA,
THE CITY OF SAN ANTONIO, TEXAS,
THE CITY OF SAN FRANCISCO, CALIFORNIA,
BROWARD COUNTY, FLORIDA,
THE STATE OF ARIZONA,
THE CITY OF BALTIMORE, MARYLAND,
THE CITY OF BOSTON, MASSACHUSETTS,
THE CITY OF LONG BEACH, CALIFORNIA,
THE CITY OF SAN JOSE, CALIFORNIA,
LOS ANGELES COUNTY, CALIFORNIA,
SAN BERNARDINO COUNTY, CALIFORNIA,
THE DISTRICT OF COLUMBIA,
THE NAVAJO NATION,
THE STATE OF NEW MEXICO,
THE CITY OF TUCSON, ARIZONA,
THE COUNTY OF HUDSON, NEW JERSEY and,
THE COUNCIL OF THE GREAT CITY SCHOOLS,

Plaintiff-Intervenors,

-against- 88 CV 3474

UNITED STATES DEPARTMENT OF COMMERCE,
RONALD H. BROWN, as Secretary of the
United States Department of Commerce,
MICHAEL R. DARBY, as Under Secretary for
Economic Affairs of the United States
Department of Commerce,
BUREAU OF THE CENSUS,

BARBARA EVERITT BRYANT, as Director of
the Bureau of the Census,
WILLIAM CLINTON, as President of the
United States, and
DONALD K. ANDERSON, as Clerk of the
United States House of Representatives,

Defendants, and

THE STATE OF WISCONSIN, and
THE STATE OF OKLAHOMA,
Defendants-Intervenors.

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CITY OF ATLANTA, and
MAYNARD JACKSON, Individually
and as Mayor, City of Atlanta,

Plaintiffs,

-against- 92 CIV 1566

RONALD H. BROWN, as Secretary of
United States Department of Commerce,
BUREAU OF THE CENSUS, and
BARBARA EVERITT BRYANT, as Director
of the Bureau of the Census,

Defendants.

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FLORIDA HOUSE OF REPRESENTATIVES,
FLORIDA STATE CONFERENCE,
THE NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
MIGUEL A. DE GRANDY,

WILLYE DENNIS,
MARIO DIAZ-BALART,
Dr. CHARLES EVANS,
RODOLFO GARCIA, JR.,
BOLLEY L. "BO" JOHNSON,
ALFRED J. LAWSON, JR.,
WILLIS LOGAN, JR.,
JOHNNIE MCMILLIAN,
ALZO J. REDDICK,
PETER RUDY WALLACE,
T.K. WETHERELL,

Plaintiffs,

-against- 92 CIV 2037

RONALD H. BROWN, as Secretary of the United States Department of Commerce,
MICHAEL ESPY, as Secretary of Agriculture,
DONNA E. SHALALA, as Secretary of Health and Human Services,
HENRY CISNEROS, as Secretary of Housing and Urban Development,
ROBERT B. REICH, as Secretary of Labor,
FREDERICO PENA, as Secretary of Transportation,
RICHARD W. RILEY, as Secretary of Education, and
MICHAEL R. DARBY, as Under Secretary for Economic Affairs of

the United States Department of Commerce,

Defendants.

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MEMORANDUM AND ORDER

McLAUGHLIN, Circuit Judge*.

Plaintiffs--states, cities, citizens' groups, and individual citizens and taxpayers--seek a judgment: (1) vacating former Secretary of Commerce Robert Mosbacher's July 15, 1991 decision that the 1990 census would not be statistically adjusted; (2) ordering that such an adjustment be made; and (3) allowing plaintiffs to use and publicize certain data generated by the Census Bureau, and already produced, subject to a protective order, to the plaintiffs during this litigation. For the reasons set forth below, the Court holds that the decision against adjustment shall not be disturbed, but grants the plaintiffs' request to use and publish the Census Bureau data. The following constitute the Court's findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52.

FACTS

Just to recount the facts of this case is arduous, given its four-year history, the number of parties involved, and the complicated statistical evidence lying at the core of the dispute. Many of the material facts have been set forth in two prior published opinions--*City of New York v. United States Dep't of Commerce*, 713 F.Supp. 48 (E.D.N.Y.1989)

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*sitting by designation

("*City of New York I*"), and *City of New York v. United States Dep't of Commerce*, 739 F.Supp. 761 (E.D.N.Y.1990) ("*City of New York II*") --some familiarity with which is assumed.

Census Background

The Constitution requires a decennial census. Article I, Section 2, Clause 3 states that "[t]he actual enumeration shall be made [every ten years], in such manner as [the Congress] shall by Law direct." Congress has, in turn, delegated to the Secretary of Commerce the duty of taking the census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a) (1982). The Bureau of the Census, an agency within the Department of Commerce, actually conducts the census. *See* 13 U.S.C. § 2 (1982).

The results of the census are used for a galaxy of purposes. The federal government uses them to calculate how to dispense program funds among the states. States use the counts for political redistricting. Sociologists and historians study them for more esoteric purposes. None of this obscures the central truth that the "basic constitutional purpose" of the census is "to determine the apportionment of Representatives among the States." *Carey v. Klutznick*, 653 F.2d 732, 736 (2d Cir.1981).

The first census of the American population was in 1790. Thomas Jefferson, who was in charge of it, complained of an undercount. There have been 20 subsequent censuses. Each of them has also resulted in an undercount. More troubling than the undercount itself, however, is that racial and ethnic minorities are

undercounted to a greater degree than the population as a whole. This problem, known antiseptically as the "differential undercount," has skewed every census since the Bureau started measuring it in 1940.

Because the counts are used to calculate the political representation and financial aid to be afforded to a given area, the fear that the census may be perpetuating a system in which those most in need of representation and aid are deprived of both is a major concern. With that in mind, the Census Bureau began, after the 1980 census, to develop a method by which both the undercount of the entire population and the differential undercount could be reduced through a statistical adjustment employing a "post-enumeration survey" ("PES"). This method (and the Department of Commerce's reaction to it) lie at the heart of this case.

The 1990 Census

Taking the census has always been a daunting task, and the 1990 count was no exception. The Bureau began preparing in 1983, seeking to improve the techniques that it had used in prior censuses. Among other things, it consulted with state and local governments, planned an extensive advertising campaign, designed a more ethnically inclusive census questionnaire, and increased the amount of automation used, including the use of an automated geographic control system, which assured accurate and timely maps and geographic files for the 1990 census. While the parties may disagree on the quality of the census counts achieved in 1990, the four-step procedure used to conduct the census is largely undisputed.

First: an address list of housing units was compiled. This list was crucial because it indicated every household in the nation to which the Bureau would send questionnaires. Since the Bureau relies on the mail return of those questionnaires to count a majority of the population, an accurate and comprehensive list was vitally important. In constructing the list, the Bureau relied primarily on commercial mailing lists, supplemented by extensive field research and collaboration with the Postal Service. Then, numerous quality controls were instituted to improve the accuracy of the list.

Second: census questionnaires were mailed to each housing unit. Householders were asked to complete and return the questionnaires to the local census district office on or before April 1, 1990.[1] This is called the "mail out/mail back" phase. The effort to get individuals to participate in the mail out/mail back phase was extensive. In addition to the Census Bureau's general advertising campaign, it also conducted campaigns specifically targeted at African-Americans, Asians, Hispanics, and Native Americans. In addition, the Bureau published specialized, foreign-language brochures encouraging public participation in the census. It also maintained a set of toll-free numbers (in eight languages) for anyone who had questions regarding the census questionnaire, and every census form advised Spanish speakers that they could call a toll-free 800 number to obtain a census form in Spanish. Finally, the Census Bureau employed different methods in areas where it was believed that the normal procedure would be particularly ineffective. *See* Secretary of the Department of Commerce,

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[1]April 1, 1990 day is officially entitled "Census Day," and is the precise date as of which the Census Bureau seeks to count the population.

Decision on Whether or Not a Statistical Adjustment of the 1990 Decennial Census of Population Should be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population, July 15, 1991 (the "*Decision*"), at 4-5-4-6.

Third: because the return rate of census questionnaires is obviously never 100%, and in 1990 was only 63%, *see* Transcript of Trial ("Tr.") at 1823, the Census Bureau embarked on an extensive follow-up campaign. Second mailings were sent to households that failed to return the initial form, and in census districts with particularly low return rates, the Bureau remailed census forms to all residents. Tr. at 1730-31.

Fourth: when steps 1-3 did not produce a census return from a particular household, the Census Bureau engaged in "non-response follow-up," the final stage of the enumeration. During this phase, each non-responding housing unit was assigned to a "census enumerator," an employee who was directed to make up to six attempts to contact a household member to obtain the information necessary to complete a census form. If this also proved fruitless, the enumerator was then required to try to obtain basic information on the missing housing unit from a reliable source, such as a neighbor or building manager. *Decision* at 4-7. Once 95% of a district's operations were completed, a final phase of non-response follow-up required enumerators to make one last-ditch attempt to visit each remaining unresolved household to obtain as complete an interview as possible.

After the enumeration was completed, post-enumeration "Coverage Improvement Programs"[2] were implemented, with the result that 5.4 million people were added to the counts. *Decision* at 4-7. The result of all of these efforts was that 249,632,692 people were counted during the 1990 census. *Decision* at 4-2.

The Differential Undercount

Despite the herculean efforts of the Census Bureau, it is undisputed that the 1990 Census was not--and could not realistically be--successful in its goal of achieving an exact count of the nation's population. Given the nature of the task, it is not surprising that the census fails to count some individuals ("omissions") and also adds persons into the count erroneously ("erroneous enumerations"). Tr. at 80-82.

The "net undercount" is the difference between omissions and erroneous enumerations. It is undisputed that the 1990 census, like all previous censuses, resulted in a net national undercount. *Decision* at 1-1. It is similarly uncontroverted that African-Americans and other minorities have been persistently undercounted to a greater degree than

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[2]These coverage improvement programs included: (1) a 100 percent re-check of vacant, uninhabitable, or nonexistent units; (2) the "Were you counted?" advertising campaign to reach people who thought they might have been missed by the census; (3) a parolee and probationer check, to set the names and Census Day addresses of those people and add them to the census if they had not already been counted; (4) the housing coverage check, in which the Census Bureau recanvassed select blocks based on evidence flushed out by the automated management information system; and (5) the local government review program, which provided local governments with the opportunity to challenge census counts for their areas. *Decision* at 4-7-4-9.

non-Hispanic whites in all censuses since 1940 when the Bureau began measuring such differences, and that this anomaly is perpetuated in the 1990 census. The difference between the undercount rate for non-Hispanic whites and that for minority populations is known as the "differential undercount." Tr. at 91-92. According to the Secretary, "Blacks appear to have been undercounted in the 1990 census by 4.8%, Hispanics by 5.2%, Asian-Pacific Islanders by 3.1%, and American Indians by 5.0%, while non-Blacks appear to have been undercounted by 1.7%." *Decision* at 1-1.

The Possibility of Statistical Adjustment

The Census Bureau has been aware of the existence of a differential undercount since the 1950's. The intractable problem has been how to fix it. Following the 1980 census, concerns over the persistence of the differential undercount, its deleterious effects on the accuracy of census counts, and the unfair results arising from such inaccuracy, prompted the Bureau to start a research program aimed at developing statistical techniques to ameliorate the problem in the 1990 census.[3] Tr. at 525, 1291-92. By 1984, the Bureau had developed a timetable for internal Bureau research that would ultimately lead to a decision whether to adjust the 1990 census statistically in an effort to reduce the differential

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[3]Discomfiture over the persistent pattern of differential undercount had prompted the Bureau to conduct a Post-Enumeration Program (the "PEP") in 1980, a survey designed to evaluate the quality of the 1980 census and to estimate the undercount, including the differential undercount, at both national and subnational levels. A lawsuit to have the 1980 census adjusted statistically by use of the PEP or another statistical technique was unsuccessful. *See Cuomo v. Baldrige*, 674 F.Supp. 1089 (S.D.N.Y.1987).

undercount. Two task forces were created to consider the undercount problem as it related to the upcoming 1990 census: The Undercount Steering Committee ("USC") was responsible for planning undercount research and policy development. The Undercount Research Staff ("URS") conducted the actual research. Other divisions at the Bureau also conducted research on the undercount and the possibility of adjustment. Tr. at 517-25, 1292-93. In addition, the Bureau sought the opinions of outside experts and organizations, such as the American Statistical Association and the National Academy of Science, regarding the possibilities for adjustment.

After considering the alternatives, the Bureau settled upon the PES as the best tool to statistically adjust the census through the use of "dual system estimation" ("DSE"). Tr. at 559-61. Dual system estimation or, in more pedestrian terms, "capture/recapture," is, as relevant here, an approach that uses a second measurement to ascertain the quality of the estimate obtained by an initial measurement, and then uses that information to provide a purportedly more accurate, dual system estimate.[4] Here, the original enumeration, the census, was followed by a second measurement, the PES, which attempted to measure the rate at which people were omitted and erroneously enumerated by the census, in order to determine a net undercount rate.

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[4]At trial, the parties explained capture/recapture in terms of determining the number of fish in a lake. First you capture 1000 fish, tag them and throw them back. Then, you catch another 100. If 90 of those have tags, it suggests that 90 percent of all the fish in the lake are tagged. If so, then the 1000 fish initially tagged represent 90% of all the fish in the lake. Doing the algebra, the total population of fish in the lake is therefore 1,111. Tr. at 41-42.

While the Bureau has used post-enumeration surveys in a variety of ways since 1950, it has never statistically adjusted based on DSE. The Bureau worked throughout the 1980's to design the PES to make it an effective tool for census adjustment. Tr. at 572. For example, correlation bias, which may occur when residents become confused by an overlap between the census and the PES, was addressed by distinctly separating the two procedures. Tr. at 578-82. Another species of correlation bias, which arises when individuals who have different probabilities of being counted ("capture probabilities") in the census are grouped together in the PES, was reduced by the use of "poststratification." Tr. at 205-208.[5] In addition, statistical "smoothing" was chosen to address anomalous results in the PES.[6]

By the Spring of 1987, after much testing and fine-tuning, the Census Director, John Keane, had decided that the Bureau should proceed with plans to adjust the 1990 census data through the use of DSE, if the PES results met a certain quality standard. Dr. Keane met with his superior, Robert Ortner, the Under Secretary of the Department of Commerce, to tell him that such a decision had been made and that a press conference to that effect was imminent. Six days later, Keane met again with Ortner and other

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[5]Poststratification grouped all individuals with a similar likelihood of being counted in the census. These groups, labeled "poststrata", were defined by age, sex, race, Hispanic origin, housing tenure (*i.e.* whether the individual owned or rented a residence), type of place (*i.e.*, central city, suburb, outside metropolitan area), and geographic region. Tr. at 513. This categorization resulted in a total of 1,392 exhaustive and mutually exclusive poststrata. Tr. at 206-07. In other words, each resident of the United States fits into one, and only one, poststratum.

[6]For an explanation of smoothing, see *infra* note 10.

Commerce Department officials, who informed Keane that *they* had decided against adjustment. Shortly thereafter, Commerce Department officials instructed their Census Bureau officials not to disclose that a decision had been made. Tr. 629-30, 1330. On October 30, 1987 the Department of Commerce announced its decision against adjustment, and this lawsuit was born.

History of This Litigation

In November, 1988, plaintiffs sued to enjoin the 1990 census, challenging the methodology by which it would be taken, and seeking to reverse the decision against adjustment. Defendants--the Department of Commerce, its Secretary, President Bush, and other officials within the Department of Commerce and its subsidiary, the Bureau of the Census--moved to dismiss the application for the injunction. This Court denied the dismissal motion, holding that the plaintiffs had standing to challenge the census on

constitutional grounds;[7] the Court also ruled that it would consider the Commerce Department's decision against adjustment under the "arbitrary and capricious" standard of review of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982) (the "APA"). *City of New York I*, 713 F.Supp. at 54.

When the dismissal motion was denied, a hearing was scheduled on the injunction. It was set to go forward in the Summer of 1989, when, at the eleventh hour, the parties entered into a stipulation (the "Stipulation" or the "Stip."). The Stipulation vacated the Commerce Department's 1987 decision against adjustment and agreed that the new Commerce Secretary, Robert Mosbacher, would consider *de novo* and "with an open mind," whether adjustment was warranted. Stip. at 2-3. The Stipulation also agreed that the program to gather the statistical data necessary for adjustment would proceed, that the Secretary would decide whether to adjust by July 15, 1991, and that his decision would be consistent with certain procedures, including the promulgation of "guidelines" articulating what the defendants believed to be the relevant technical and policy considerations affecting the decision. It also mandated the creation of an eight-member Special Advisory Panel (the

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[7]While the defendants continued to argue during pretrial proceedings that this case presented a non-justiciable political question, the Supreme Court has now rejected this argument, holding that constitutional challenges to the census methods employed to arrive at the apportionment are justiciable. *United States Dep't of Commerce v. Montana*, ___ U.S. ____, ____, 112 S.Ct. 1415, 1424-26, 118 L.Ed.2d 87 (1992).

"Panel")[8] of statistical and demographic experts to advise the Secretary on whether to adjust. Stip. at 4-5.

The defendants adopted and promulgated the required guidelines, but the plaintiffs challenged them as inadequate, and they also sought a declaratory judgment that a statistical adjustment would not violate the Constitution or any federal statute. Defendants countered that the plaintiffs' challenge to the census presented a non-justiciable political question. This Court rejected the defendants' political question claim, and concluded that statistical adjustment, per se, would not violate either the Constitution or the laws of the United States. *City of New York II*, 739 F.Supp. at 767-68. This Court noted that, while the guidelines were vague, they did satisfy, albeit just barely, the defendants' obligations under the Stipulation. *Id.* at 770.

The Post-Enumeration Survey

Following this Court's decision in *City of New York I*, the Bureau resumed work on its plans to implement the PES, and implemented it in 1990. In the first step of the

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[8]By agreement, the Secretary chose four members of the Panel from a list of seven candidates submitted by the plaintiffs, and chose the four remaining Panel members himself. The Stipulation required the Panel members to be "of such knowledge, judgment and probity that their judgment and advice shall be entitled to the utmost respect by defendants." Stip. at 5. The four panel members chosen from the plaintiffs' list were Eugene P. Ericksen, Leobardo F. Estrada, John W. Tukey, and Kirk M. Wolter. The four panel members chosen unilaterally by the Secretary were William Kruskal, Michael McGeehee, V. Lance Tarrance Jr. and Kenneth M. Wachter. As required by the Stipulation, the Panel members submitted recommendations to the Secretary regarding the decision on whether to adjust. Stip. at 5.

PES, the Bureau methodically selected approximately 5000 blocks[9] in an effort to attain an appropriate sample size for each poststratum. In February 1990, Bureau employees visited each sample block and listed all the housing units they found, identifying approximately 170,000 households. In July 1990, Census Bureau interviewers returned to each address to obtain information regarding the residency status of those households on Census Day. The Bureau found that those blocks contained approximately 400,000 people. Tr. at 208. After collecting the PES data, the Bureau matched it to the information collected in the original enumeration for those same sample blocks. From this matching, the Bureau endeavored to estimate, for each poststratum, rates of omission and erroneous enumeration, and from these calculated a net undercount rate for each poststratum. Tr. at 221.

The Bureau used these results to develop an "adjustment factor" for each poststratum, *i.e.*, the number by which the population count as indicated by the census had to be multiplied so that the entire census would reflect the variations found in the PES. Accordingly, the 1,392 poststrata resulted in 1,392 corresponding adjustment factors. One further statistical twist to the use of the PES was the

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[9]As used here, "block" means a square block; that is, all the buildings on four streets forming a square. Tr. at 209. The Census Bureau made a list of the more than 5,000,000 blocks in the United States and then selected approximately 5,000 that they believed fairly contained representative samples of the 1,392 poststrata. Tr. at 208; *Decision* at 4-11-4-12.

employment of "smoothing."[10] After smoothing, the Bureau used the smoothed adjustment factors to produce adjusted counts down to the block level, which were then aggregated to provide population estimates for cities, counties, states, and the nation. Tr. at 224-25; *Decision* at 4-18.

A number of quality control checks were made to test the results of the PES. First, the Bureau conducted or commissioned more than twenty formal research projects, called "P-Studies," to study the potential sources of error within the PES. The results of these P-Studies regarding

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[10]Smoothing is a statistical procedure used to reduce the effects of sampling error. More particularly, it seeks to reduce the difference between the results from the PES sample and the results one would receive if one were able to survey the entire population. Smoothing in the 1990 census took place as follows. First, the 1,392 raw adjustment factors with corresponding raw variances (measures of sampling error) were compiled. The Bureau then employed pre-smoothing, or "modelling the variance," in an attempt to improve the accuracy of the estimates of the variances of the raw adjustment factors. Tr. at 796. Once modelling the variance was completed for each raw adjustment factor, a regression was performed. This regression moved the raw adjustment factor for each poststratum towards a typical value by an amount depending on the sampling error associated with that particular poststratum. Thus, where a particular raw adjustment factor had a small variance (*i.e.*, where the sample was very large), it would be moved only a small amount, whereas raw adjustment factors with larger variances tended to be moved more. Carrier variables relating to raw adjustment factors were selected in an effort to give the best estimate of the typical value. Tr. 807. These carrier variables included the same characteristics that defined the post-strata, such as age, sex, race, owner/renter, and other characteristics such as mail return rate. The end result is that the 1,392 raw adjustment factors became 1,392 smoothed adjusted factors. The census count for each postratum group was then multiplied by its smoothed adjustment factor and adjusted census counts were produced. Tr. at 788-89; *Decision* at 4-17-4-18.

particular sources of error were then combined in the "total error model" that summarized the overall quality of the PES data. Tr. at 652-59.[11]

The final result of the PES was that the census enumeration was estimated to have undercounted the population by 5,269,917, or 2.07%. In terms of the differential undercount, the PES indicated that the census undercounted Hispanics by 5.2%, African-Americans by 4.8% and Asian/Pacific Islanders by 3.1%. The PES-calculated undercount for non-African-Americans was 1.7% and 1.2% for non-Hispanic whites, with a total national undercount of 2.1%.[12]

The Bureau also conducted a number of "loss function analyses" to compare the quality of enumeration counts to the adjusted counts. A loss function analysis is a systematic way of assessing the consequences flowing from a particular decision. In the context of the adjustment decision, the Bureau used loss function analysis to determine whether the adjusted data were expected to be more accurate

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[11]The major potential sources of error arising from the PES included: missing data, poor quality of the reported Census Day address list, fabrication, matching error, measurement of erroneous enumerations, balancing the estimates of gross overcount and gross undercount, correlation bias, small area estimation, and late census data. Tr. at 570-73.

[12]A recent "discovery of computer errors and some statistical changes have reduced the estimates of an undercount to 1.6 percent, about the same as in 1980." Felicity Barringer, *U.S. Population Passes 265 Million, Bureau Says*, N.Y. Times, December 30, 1992, at A12. As one of the witnesses testified here, "statistics is never having to say you're certain." Tr. at 1922.

than the unadjusted data. Tr. at 1941-42. This Court is satisfied that for most purposes the PES resulted in a more accurate--or to be statistically fashionable, a less inaccurate--count than the original census.

The Secretary's Decision and The Trial

Prior to reaching his decision, Secretary Mosbacher received the recommendations of the eight Panel members. Perhaps not surprisingly, the Panel was deadlocked: the four members selected from the plaintiffs' list recommended in favor of adjustment, while the four members chosen unilaterally by the Secretary recommended against it. *Decision* at 1-3. The USC voted 7-2 in favor of adjustment. *Id.* The Under Secretary of Commerce for Economic Affairs and the Administrator of the Economics and Statistics Administration voted against adjustment. Defendants' Exhibit 1 at 898. Finally, the Director of the Census, Dr. Barbara Bryant recommended in favor of adjustment, but acknowledged that "[t]here is no perfect truth as to the size and distribution of the population," and that "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree. The minority viewpoint expressed in the Census Bureau's report ... illustrates this." *Id.* at 1118-19.[13]

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[13]Dr. Bryant's comments in a year-end interview are enlightening. *See Barringer, supra* note 12. In that interview "she said [that] while the statistical tools were available to make these adjustments for small geographical units, the necessary tools to double-check the findings were inadequate. In the face of legal scrutiny she said, this made a decision to adjust untenable." She is also quoted as stating that "'[e]very number has to become defensible,'" and "'[w]hen you say--you know how to do it but you can't prove its right or wrong--then it's no longer defensible. If it weren't for the problem that we had to defend it in court, there

On July 15, 1991, in accordance with the Stipulation, Secretary Mosbacher went on national television to announce his decision not to adjust. Simultaneously, he produced the *Decision*, a 178-page report giving the reasons for his decision. The decision revitalized the case and discovery resumed. Claiming that the Secretary's decision violated the Constitution, the APA, and the Stipulation, the plaintiffs requested a trial. More specifically, they alleged that the administrative record proffered by the Secretary as the basis of his decision is a self-serving, post-hoc compilation of documents assembled for the purpose of strengthening the defendants' litigation position and that the Secretary's decision was tainted by partisan political influence. Over the defendants' objection, this Court ordered a trial, which consisted almost exclusively of expert testimony in the fields of demographics and statistics, and continued for thirteen trial days.[14]

The expert witnesses expressed their opinions as to whether the Secretary considered all the factors specified in the guidelines in making his decision, and also analyzed at length the conclusions that the Secretary reached in the *Decision*. Plaintiffs' direct case consisted of the testimony

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would have been a strong inclination to have adjusted....'"

Dr. Bryant also opined that she believed that an adjustment would have improved the accuracy of counts at " 'the national and state levels, the big levels,'" but that the PES results were "'very inconclusive' when used for smaller subdivisions of the population." *Id.*

[14]Before trial, two other cases presenting the identical issue in this case were transferred and consolidated with this action--*City of Atlanta v. Mosbacher*, 92-CV-1566; *Florida House of Representatives v. Franklin*, 92-CV-2037.

of nine witnesses, including all four of the plaintiffs' designees to the Panel. It also included the introduction of hundreds of exhibits and numerous deposition transcripts from other witnesses.

Defendants' evidence was similarly grand in scope. They presented five expert witnesses, including one Panel member. They also introduced the deposition transcripts of other witnesses and numerous exhibits. Of these, Exhibit 1, denominated as the Administrative Record by the defendants, and skeptically dubbed "the so-called Administrative Record" by the plaintiffs, contains over 12,000 documents and occupies 18,000 pages. The trial transcript exceeds 2,600 pages.

DISCUSSION

Plaintiffs allege that the Secretary's decision not to adjust the census count violates the APA, the Constitution, and the Stipulation.[15] They also argue that the process the

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[15]Plaintiff Hudson County, New Jersey, also claims that the decision against adjustment violated the Voting Rights Act, which provides that:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied *by any State or political subdivision* in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

42 U.S.C. § 1973(a) (1982) (emphasis added). The Court rejects this claim because it is close to frivolous. By its plain language, the Voting Rights Act applies only to misconduct by states or their political subdivisions. *See Senate of California v. Mosbacher*, 968 F.2d 974, 979 (9th Cir.1992) (argument that Voting Rights Act contemplates suits

Secretary used to make his decision was a sham.[16] They seek an order directing the Secretary of Commerce to make the adjustment and they ask for permission to use Census Bureau data provided to them by the defendants during the course of this litigation under a protective order, and to release that data to the public.

I. The APA Standard of Review--Finality

The standard by which the Court reviews the Secretary's decision not to adjust should be stated at the threshold. At a previous stage in this litigation, this Court announced that "the arbitrary and capricious standard as set forth in § 706 of the APA will guide my review of the Secretary's determination." *City of New York I*, 713 F.Supp. at 54.

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against the federal government is "severely flawed"); *Tucker v. United States Dep't of Commerce*, 958 F.2d 1411, 1414 (7th Cir.) ("The plaintiffs cannot be serious in arguing that the refusal to adjust the headcount violates the Voting Rights Act."), *cert. denied*, ___ U.S. ____, 113 S.Ct. 407, 121 L.Ed.2d 332 (1992).

[16]Plaintiffs assert that Secretary Mosbacher was closely aligned with the Republican Party and, therefore, never seriously considered adjustment in the belief that adjustment would favor Democratic politicians. They also argue that contacts made by then-White House Chief of Staff John Sununu and a member of his staff to Commerce Department officials other than Mr. Mosbacher tainted the decision. I have reviewed these allegations in detail. While it does appear that Mr. Sununu and his subordinates expressed their contempt for adjustment to Department of Commerce personnel, I cannot, on the record before me, conclude that such contacts represented improper influence. Moreover, the plaintiffs' attack on the integrity of Mr. Mosbacher--who was never a party to these conversations--does not warrant extended discussion here.

Defendants now contend that the plaintiffs' claim under the APA and, with it, this Court's decision to review the Secretary's decision under the arbitrary and capricious standard, have been vitiated by the Supreme Court's recent decision in *Franklin v. Massachusetts*, ___ U.S. ____, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). There, Massachusetts challenged the Census Bureau's method for counting federal employees serving overseas, alleging that it was arbitrary and capricious, and, as such, a violation of the APA. Massachusetts also asserted that the method violated the constitutional requirements for conducting a decennial census and damaged it because it changed the congressional apportionment, moving one representative from Massachusetts to Washington. *Id.* at ____, 112 S.Ct. at 2770.

Refusing to address the APA claim, the Supreme Court concluded that the Secretary's determination was not "final" because, in the context of apportionment, the Secretary simply reports the results of the census to the President, who in turn transmits the apportionment for each state in the House of Representatives to the Clerk of the House. The Court reasoned that because "there is no statute that rules out an instruction by the President to the Secretary to reform the census, even after the data is [sic] submitted to him," the Secretary's decision as to how foreign federal employees are counted is "like the ruling of a subordinate official," and, therefore, not final for purposes of APA review. *Id.* at ____, 112 S.Ct. at 2774 (citation omitted).

Defendants believe that the same rationale that led the Supreme Court to reject the APA claim in *Franklin v. Massachusetts*, an apportionment case, applies with equal vigor here. I disagree. The Supreme Court held that the

Secretary's acts in conducting the census and reporting the counts to the President were not "final," for purposes of challenging *apportionment*. That case did not involve a situation where, as here, plaintiffs challenge the counts as they are used for intra-state *redistricting* and for *federal fund allocation*. *See City of New York I*, 713 F.Supp. at 50. Neither of these purposes requires the Secretary to transmit the counts to the President before publishing them or transmitting them to census data users.[17] The Secretary's reporting of the counts for those purposes, accordingly, is final agency action for purposes of APA review. As Justice Stevens explained in *Franklin*:

> Even in the Court's view, the Secretary's report of census information to recipients other than the President would certainly constitute "final agency action." The Court's decision thus appears to

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[17]With respect to redistricting, 13 U.S.C. § 141(c) provides, in pertinent part, that:

> Tabulations of population for the areas identified in any plan approved by the Secretary shall be ... reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State....

Id. With respect to the plaintiffs' claim based on allocation of federal funds, the following statutes provide for direct reporting of census data by the Secretary of Commerce, without the President either acting as an intermediary or retaining final discretionary authority to report the counts: 42 U.S.C. § 9831 *et seq.* (Head Start program); 42 U.S.C. § 702 (Maternal and Child Health Services Block Grant); 42 U.S.C. § 5632 (Juvenile Justice and Delinquency Prevention Program); 42 U.S.C. §§ 3024, 3028(b) (Programs for Older Americans); 23 U.S.C. § 104(b)(6) (Highway Planning and Construction); 49 U.S.C.App. § 1607a (Urban Mass Transportation Capital and Operating Assistance programs).

> amount to a pleading requirement. To avoid the bar to APA review that the Court imposes today, litigants need only join their apportionment challenges to other census-related claims. Notwithstanding the Court's novel reading of the statute, in view of the Secretary's insistence on unitary census data, relief on any census claim would yield relief on all other claims.

Franklin, ___ U.S. at ____, n. 14, 112 S.Ct. at 2783, n. 14 (Stevens, J., concurring).

Accordingly, I adhere to my earlier decision that the APA governs the Secretary's decision. Hence, the question

for review is, as the plaintiffs have pithily stated, "whether the Secretary's application of the decision guidelines, as construed in light of constitutional requirements, to reject the [adjusted] counts is arbitrary and capricious."[18] Plaintiffs' Brief at 148.

II. The Constitutional Requirements

In *Franklin v. Massachusetts*, the Supreme Court reminded us that in making decisions regarding the census, "the Secretary's interpretation [of Art. I, § 2, cl. 3] [must be] consistent with the constitutional language and the constitutional goal of equal representation." ___ U.S. at ____, 112 S.Ct. at 2777. The language of the Constitution is beguilingly simple: "The actual enumeration shall be

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[18]Plaintiffs also contend that the Secretary's decision was arbitrary and capricious independently of the Stipulation, because it conflicted with a Department Organization Order in which the Secretary delegated authority to conduct the Census to the Director of the Census Bureau. Department of Commerce Organization Order 35-2A, August 4, 1975, as updated July 24, 1987. I find this argument unpersuasive. While the Secretary did delegate his statutory duty to take the decennial census, he also required the Director of the Census Bureau to "report and be responsible to the Assistant Secretary for Economic Affairs," a position which subsequently became the Under Secretary for Economic Affairs. *Id.*; 15 U.S.C. § 1503a. The Secretary further directed the Under Secretary for Economic Affairs to "exercise policy direction and general supervision over ... the Bureau of the Census." Department of Commerce Organization Order 10-9, § 4.03, June 26, 1984. Thus, while delegating the operational responsibility necessary to prepare and conduct the census, the Commerce Department retained the authority to control policy direction, to exercise decision-making authority in significant Bureau matters, and to supervise the Bureau in the exercise of its census-taking task.

made ... in such manner as [the Congress] shall by Law direct."

While the defendants contend that the phrase "actual enumeration" bars adjustment, I have previously concluded "that because Article I, § 2 requires the census to be as accurate as practicable, the Constitution is not a bar to statistical adjustment." *City of New York II*, 739 F.Supp. at 767; *cf. Kirkpatrick v. Preisler*, 394 U.S. 526, 530, 89 S.Ct. 1225, 1228, 22 L.Ed.2d 519 (1969) ("[t]he whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances"); *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 84 S.Ct. 526, 530, 11 L.Ed.2d 481 (1964) ("as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's").

The defendants also claim that judicial scrutiny of the Secretary's decision for accuracy is inappropriate after the Supreme Court's recent decision in *United States Dep't of Commerce v. Montana*, ___ U.S. ____, 112 S.Ct. 1415, 118 L.Ed.2d 87 (1992). In *Montana*, the state challenged a federal statute governing the method by which Representatives are allocated to the states because it resulted in giving Montana only one congressional seat, although its population was significantly higher than that of the average congressional district in the nation. The Court rejected the challenge, noting that "although common sense supports a test requiring a good faith effort to achieve precise mathematical equality *within* each State, the constraints imposed by Article I, § 2, itself make that goal illusory for the nation as a whole." *Id.* at ____, 112 S.Ct. at 1429 (emphasis in original) (citation omitted). The specific constraints making mathematical precision illusory on the

national level were "[t]he constitutional guarantee of a minimum of one Representative for each State," and "the need to allocate a fixed number of indivisible Representatives among 50 states of varying populations." *Id.*

I reject the government's argument that *Montana* mandates a departure from my earlier conclusion that the Secretary of Commerce must conduct the census in a manner to render it as accurate as practicable. First, the constitutional constraints that warranted departure from that standard in *Montana* are not present here. Second, in *Montana*, the Court noted that Art. I, § 8, cl. 18, of the Constitution "expressly authorizes Congress to enact legislation that 'shall be necessary and proper' to carry out its delegated responsibilities." *Id.* Here, no constitutional provision requires similar deference to the Secretary's decision. Finally, the *Montana* case involved a challenge to a census procedure only as it related to apportionment, not as it related to intra-state redistricting. Here, by contrast, the decision on whether to adjust the 1990 census had profound effects on intra-state redistricting because the adjusted counts would change not only national and state population figures, but the counts for political subdivisions within states, such as cities and counties. Because the implications of the Secretary's decision at issue here are fundamentally different from the federal statute at issue in *Montana*, I adhere to my earlier conclusion that the Secretary must assure that the census be as accurate as practicable.

The conclusion that the Secretary must provide the most accurate census practicable however, does not, lead inexorably to the conclusion that a decision against adjustment is therefore unconstitutional. In deciding whether

the Secretary's decision was arbitrary and capricious in light of the requirement that the decision provide the most accurate census practicable, the Court must turn to the Secretary's consideration of the guidelines, which help to illuminate the meaning of both "accuracy" and "practicability."

III. The Guidelines

An agency decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983). Here, the analytical scaffolding for review of the Secretary's decision is established by the guidelines promulgated in accordance with the Stipulation.[19]

The Stipulation provided that the Secretary retained all authority and decision-making power, "including without limitation the decision whether or not to adjust the 1990 Decennial Census." Stip. at 1. It also required the defendants to "develop and adopt guidelines articulating what defendants believe are the relevant technical and nontechnical statistical and policy grounds for decision on whether to

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[19]A discussion of how the guidelines were formulated, considered, and ultimately promulgated may be found in the earlier opinion in which I rejected a challenge to their sufficiency. *City of New York II*, 739 F.Supp. at 769 & n. 9.

adjust the 1990 Decennial Census population courts." Stip. at 3. Accordingly, the defendants promulgated the following eight final guidelines to serve as the grid against which the Secretary's decision must be measured:

1. The Census shall be considered the most accurate count of the population of the United States, at the national, state, and local level, unless an adjusted count is shown to be more accurate. The criteria for accuracy shall follow accepted statistical practice and shall require the highest level of professional judgment from the Bureau of the Census. No statistical or inferential procedure may be used as a substitute for the Census. Such procedures may only be used as supplements to the Census.

2. The 1990 Census may be adjusted if the adjusted counts are consistent and complete across all jurisdictional levels: national, state, local, and census block. The resulting counts must be of sufficient quality and level of detail to be *usable* for Congressional reapportionment and legislative redistricting, and for all other purposes and at all levels for which census counts are published.

3. The 1990 Census may be adjusted if the estimates generated from the pre-specified procedures that will lead to an adjustment decision are shown to be more accurate than the census enumeration. In particular, these estimates must be shown to be robust to variations in reasonable alternatives to the production procedures, and to variations in the statistical models used to generate the adjusted figures.

4. The decision whether or not to adjust the 1990 Census should take into account the effects such a decision might have on future census efforts.

5. Any adjustment of the 1990 Census may not violate the United States Constitution or Federal statutes.

6. There will be a determination whether to adjust the 1990 Census when sufficient data are available, and when analysis of the data is complete enough to make such a determination. If sufficient data and analysis of the data are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust the 1990 Census.

7. The decision whether or not to adjust the 1990 Census shall take into account the potential disruption of the process of the orderly transfer of political representation likely to be caused by either course of action.

8. The ability to articulate clearly the basis and implications of the decision whether or not to adjust shall be a factor in the decision. The *general rationale* for the decision will be clearly stated. The technical documentation lying behind the adjustment decision shall be in keeping with professional standards of the statistical community.

City of New York II, 739 F.Supp. at 769 (emphasis in original).

"Most of these guidelines are embroidered with an accompanying 'explanation.'" *Id.* The *Decision* discussed

each of the guidelines in detail, and concluded that numbers 1, 2, 3, 4 and 7 militated against an adjustment, while numbers 5, 6, and 8 did not tilt either way. The plaintiffs argue that the conclusions reached by the Secretary with respect to guidelines 1, 2, 3, 4 and 7 are the result of implausible assumptions, unwarranted speculation, and misuse, misstatement, and disregard of the evidence.

Guideline One

Guideline One, establishes the point of departure for analysis of the adjustment question. It mandates that the actual count be considered the most accurate count of the population "at the national state and local level, unless an adjusted count is shown to be more accurate."

To test the accuracy of the adjusted counts against the actual enumeration, the *Decision* referred to a population measurement technique that the Census Bureau had used, Demographic Analysis ("DA"). *Decision* at 2-9. DA estimates the population, and the subpopulations of particular groups, through administrative records such as birth and death certificates, and immigration statistics. *Id.* The Secretary conceded "that the PES and DA estimates are not far apart in a statistical sense," but found "some important and puzzling differences," which "lead to sharply different conclusions" and raise some "question" as to "whether the adjusted figures are more accurate than the census count even at the national level." *Id.* at 2-10, 2-35.

Among the specific problems that the Secretary noted were: (1) that the overall undercount rate inferred from comparing the actual enumeration to DA (1.85%) is smaller than that inferred from the PES (2.07%), a result contrary

to intuitive expectation;[20] (2) that, at the national level, there were instances where a PES-based adjustment would move sub-population totals in the opposite direction from that indicated by DA;[21] (3) that PES would add 1,055,826 more females than DA indicates should be added; and (4) "that all groups of black males (except those aged 10-19) are substantially undercounted by the PES relative to DA." *Decision* at 2-10.

In addition to a comparison with DA, the Secretary also discussed a number of other statistical techniques that were used to gauge the accuracy of the PES counts when compared to the census results. He conceded that the PES-adjusted estimates might reflect more accurately the total population, and the racial and ethnic subpopulations of the country, and that "[a]t the State and local level.... the adjusted figures tend to be too high, but generally closer in

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[20]According to the Secretary, DA would normally be expected to reveal a higher undercount rate when compared to the Census than the PES would, because the PES and Census will both miss people who are difficult to survey, while DA, which relies solely on an examination of records, will not. *Decision* at 2-10.

[21]Some examples of this problem cited by the Secretary are:

> An adjustment based on the PES will *add* 180,318 non-black males aged 10-19, while the DA indicates 136,908 should be *deleted*--a difference in the wrong direction of 317,226.
> An adjustment based on the PES will *delete* 91,631 males over the age of 65, while DA indicates that 192,950 should be *added*--a difference in the wrong direction of 284,541 persons.
> An adjustment based on the PES will *delete* 245,253 females over the age of 45 while DA indicates 146,255 should be *added*--a difference of 391,508 persons in the wrong direction.

Decision at 2-12 (footnotes omitted).

numeric terms to the true population than the census counts which tend to be too low." *Id.* at 2-1. He concluded, however, that "[t]he loss function analysis and hypothesis tests that have been prepared by the Census Bureau to date, although of uncertain reliability, do support the superior accuracy of the census counts versus the adjusted figures when we consider distributive accuracy--or fairness--and use reasonable estimates of the error variance of the alternative [PES-based adjustment]." *Id.* at 2-2.

He also expressed concern that there was little or no direct evidence that the adjusted counts led to greater distributive accuracy at local levels. On that basis, the Secretary concluded that Guideline One militated against adjustment because "acceptance of adjusted counts as more accurate requires not only that the *counts themselves* be shown to be more accurate, but that the *distribution of those counts* across the United States reflect more accurately the distribution of the population." *Id.* at 2-8 (emphasis in original).

As support for these concerns, the Secretary discussed a Census Bureau loss function analysis that measured the number of individual states whose population would be made less accurate by adjustment than by using the census count. As conducted by the Bureau, the loss function indicated that 21 states' population shares would be made less accurate by adjustment. However, when the Secretary employed a statistical variance toward the low end of the acceptable range envisioned by the USC, he found that the proportional shares of 28 or 29 states would be worsened by adjustment. *Id.* at 2-30. The Secretary similarly expressed his trepidation that there was insufficient evidence to support

the greater distributive accuracy of the adjusted counts at the local level. *Id.*

In his consideration of Guideline One, the Secretary also expressed serious concern over the methodology by which the PES was taken, and the manner in which the adjusted counts were tabulated.[22] He was particularly discomfited by the manner in which unresolved cases in the PES were treated because the Bureau had to determine whether people found in the PES were also found in the census in order to compute dual system estimates for the poststrata. Such determinations were made by "matching" census forms to PES forms for the same household. A household survey in the PES that was "matched" to the census record of that residence meant that there was no error in the census enumeration of that household. A non-match meant an undercount. *Decision* at 2-16. Because there were cases where incomplete census and PES forms made such matching impossible, the Bureau was forced to employ a mathematical model to impute enough missing characteristics to enable it to make a match determination. Even after that imputation was complete, there were people found in the PES for whom it was impossible to determine whether they matched people counted in the census, and vice-versa. In those cases a different set of formulas was used to impute match status.

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[22]Among other things, the Secretary was troubled by the effects that erroneous enumerations in the census, correlation basis, and failure in the PES total error model could have on the adjusted counts. *Id.* at 1-17-23. The proof at trial, however, has made it clear that these matters were peripheral to the Secretary's conclusion under Guideline One, and therefore do not merit significant discussion here.

The Secretary concluded that, "[i]n general, missing data were not found to be a serious problem," but identified several areas of concern with the imputation process. First, he noted that while the rates of imputation in the P and E samples[23] were low--1.7% and 2.1% respectively--weighted up to the national population they represented almost nine million people, a number almost twice as large as the net national undercount. *Decision* at 2-16. Second, in noting the high correlation between imputation ratios and undercount ratios, he stated that "the strata for which there is more doubt about the quality of the adjusted data because of imputation tend to be the same strata for which an adjustment would result in large increases in the population." *Id.* Finally, the Secretary noted that the assumptions in the imputation models were largely untested. *Decision* at 2-17. His concern was exacerbated by his respect for the research of Panel member Kenneth Wachter, which indicated that flaws in the imputation model could render the adjusted counts "significantly in error."

Based on all the foregoing, the Secretary concluded that there was simply not enough convincing evidence to support a finding that the adjusted counts would lead to greater distributive accuracy than the census counts, and therefore that the guideline "weigh[ed] in favor of a decision not to adjust." *Id.* at 2-36.

The plaintiffs assail this conclusion on several grounds. First, they argue that the Secretary misused DA

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[23]In the jargon of the DSE, the "P sample" represented the group surveyed by the PES. The "E sample" represented the people living in the same household as the P sample as counted by the census. *Decision* at 4-12-4-13.

because that technique has historically been most accurate as a "yardstick of the census in terms of national undercount and as a measure of differential undercount between demographic groups," but "is much less reliable in its ability to estimate an undercount rate for a specific group in a particular census," as the Secretary attempted to use it. They contend that the Secretary's focus on discrepancies between PES and DA undercount rates for certain specific groups is an attempt to obfuscate the fact that, as the Secretary himself admits, the "detailed analysis shows that the PES and DA estimates are not far apart in a statistical sense." *Decision* at 2-10.

With respect to the Secretary's professed concern over distributive accuracy, the plaintiffs contend that the Secretary's invocation of a loss function that merely counted up the number of states whose populations would be made less accurate, regardless of the greater aggregate accuracy of the adjustment, and without reference to the extent that counts are made less accurate, is statistically insupportable. They also argue that the Secretary's rejection of numerous loss function analyses performed by the Bureau supporting the superior accuracy of the adjusted counts, and his putative concern with the technical aspects of the PES are irrational at best, and disingenuous at worst.

I have reviewed in some detail the Secretary's conclusion that Guideline One militated against adjustment and the plaintiffs' arguments to the contrary. While the plaintiffs have made a compelling attack on the *Decision*, and the Secretary has conceded that the objective criteria used to measure the adjusted counts show a greater numeric accuracy at the national level and that the Census Bureau estimates of distributive accuracy marginally favor the

adjusted counts, I find that Secretary's conclusion under Guideline One was neither arbitrary nor capricious.

The Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits. In that regard, I find that the Secretary's use of a loss function that considered the number of states whose populations would be made less accurate by adjustment to be appropriate. Similarly, the Secretary's concern that "[w]ith respect to places under 100,000 population, there is no direct evidence that adjusted counts are more accurate" was legitimate, given Guideline One's requirement that the adjusted counts be shown to be more accurate at the local level. *Decision* at 2-30.

Plaintiffs' attack on the Secretary for subjecting the tests favoring adjustment to unrealistically rigorous scrutiny misconstrues Guideline One, which clearly states that "[t]he Census shall be considered the most accurate count of the population of the United States, at the national, state, *and local levels, unless an adjusted count is shown to be more accurate*." *City of New York II*, 739 F.Supp. at 769 (emphasis added). Thus, plaintiffs' failure to illustrate affirmatively the superior accuracy of the adjusted counts either (1) at any level mentioned in Guideline One, or (2) for any reasonable definition of accuracy, is sufficient to support a finding that Guideline One favors use of the original census counts.

Turning to the Secretary's focus on the mechanics of the PES and the use of imputation, I find this consideration

appropriate. Because the PES, like any sample survey,[24] rests on an assumption to begin with--that the portion sampled is identical to the population as a whole--placement of additional assumptions into the model caused by imputation is a fair basis for escalating skepticism. While the logic of the Secretary's conclusion regarding Guideline One is not overpowering, neither can it be characterized as arbitrary or capricious.

Guideline Two

Guideline Two states that adjustment may be made only if the adjusted counts are "consistent and complete across all jurisdictional levels: national, state, local and census block." The guideline also requires the adjusted counts to "be of sufficient quality and level of detail to be *usable* for ... all ... purposes and at all levels for which census counts are published." *City of New York II*, 739 F.Supp. at 769 (emphasis in original). The Secretary recognized that "[t]he adjusted figures ... are consistent across all jurisdictional levels and of sufficient detail for all purposes," but nevertheless concluded that Guideline Two militated against adjustment because of the questionable quality of the adjusted counts. *Decision* at 2-45.

In surmising that the counts were of debatable quality, the Secretary homed in on the "homogeneity assumption" in the construct of the 1,392 poststrata. He was troubled that the "adjustment process rests on the assumption that persons in each poststratum are homogeneous with respect to their probability of being missed by the census, *i.e.*, their capture probability." *Decision* at 2-39. Conceding

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[24]See the discussion of capture/recapture in note 4, supra.

that many experts did not find this assumption problematic, and that at broad levels such as the national and state levels the assumption caused no serious problems, the Secretary ultimately concluded that "'local heterogeneity is a serious problem for adjusting the 1990 census'", and that "'[the] evidence indicates that a substantial portion, possibly a majority, of relative counts for district-size units can be made worse off by adjustment.'" *Decision* at 2-42 (quoting *Report of Special Advisory Panel Member Kenneth Wachter*, at 26).

In reaching this conclusion, the Secretary worried that because members of an individual poststratum might have a different likelihood of being undercounted, thereby debunking the homogeneity assumption, generalizing the undercount rate of those counted in the PES to all members of that poststratum might seriously interfere with the accuracy of the count for some census purposes, including redistricting. He discussed two studies conducted by the Bureau that addressed the homogeneity assumption, and which the Bureau had relied on in concluding that individuals within each poststratum were sufficiently uniform to warrant such an assumption, dubbed the "P12" and "P15" studies. *Decision* at 2-38-2-40. The Secretary opined that the Bureau's evidence from those studies was "mixed."

He was also concerned about the adverse consequences that a failure in the homogeneity assumption could have on adjustments at local levels, noting that because there were only 5000 sample blocks, most jurisdictions would be adjusted based on data gathered elsewhere. *Decision* at 2-43.

The plaintiffs brand the Secretary's concern about heterogeneity as "unreasonable." They assert that because perfect homogeneity is utterly unattainable in the world of survey sampling, the relevant question is whether a departure from the homogeneity assumption has an important impact on the measurement. They contend that because the pertinent Census Bureau studies supported the homogeneity assumption, and particularly because the P12 study confirmed that the population subgroups defined for the PES are sufficiently uniform to be usable for adjustment, there was sufficient homogeneity to warrant the conclusion that the adjusted counts lead to improvement.

Plaintiffs' argument is rejected. While they have made a strong showing that the adjusted counts are more accurate than the original counts for most purposes for which the census is used, the Secretary's concern that heterogeneity may lead to less accurate counts at local levels used for redistricting appears reasonable. Plaintiffs' contention that the Secretary was effectively required to bite the bullet and ignore the problem that residual heterogeneity posed, once the Bureau had concluded that there was sufficient evidence to support the homogeneity assumption, ignores the guidelines' mandate that the *Secretary* determine that the adjusted counts be usable for all purposes for which census counts are published. Clearly, there is some likelihood that residual heterogeneity will have an adverse effect on the census counts when used for redistricting. This is enough to support the Secretary's conclusion that Guideline Two militates against adjustment. Accordingly, I find that his conclusion was not arbitrary or capricious.

Guideline Three

Guideline Three requires that the PES and other adjustment procedures be "pre-specified" and that the estimates they generate be "shown to be robust to variations in reasonable alternatives to the production procedures, and to variations in the statistical models used to generate the adjusted figures." *City of New York II*, 739 F.Supp. at 769. The Secretary advanced two arguments as the basis for his conclusion that Guideline Three militated against adjustment: (1) that the actual conduct of the DSE did not proceed sufficiently in accordance with a pre-specified plan; and (2) that certain statistical techniques and assumptions were not sufficiently "robust" to support adjustment.[25] *Decision* at 2-54-2-55.

On the first point, the Secretary recounted various decisions that Bureau employees made after the pre-specification of the PES, including choices about the selection of carrier variables during the regression analysis in the smoothing process. *Decision* at 2-47. He noted that one member of the Panel who voted for adjustment had conceded that certain pre-specified procedures had changed during the enumeration process and had affected the PES. *Id.* (citing *Report of Panel Member Wolter*, pp. 9-10). The Secretary agreed with Wolter's ultimate conclusion that the decisions to change pre-specified procedures made during the enumeration and the PES were treated with a high degree of professionalism and also acknowledged that the PES could

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[25]In the world of survey sampling, "robustness" describes the integrity and reasonableness of the results achieved by a particular statistical technique. Robustness is determined by exposing such statistical techniques to variations in the assumptions underlying them.

not have been completely pre-specified, but expressed his discomfort with the deviations as follows:

> Although I believe that the decisions [to deviate from pre-specified procedures] *were* made for sound professional reasons in the 1990 census, using these adjustment mechanisms opens the possibility for manipulation of future post enumeration surveys in ways that are unavailable in traditional census procedures. This weighs heavily against an adjustment of the census.

Decision at 2-48 (emphasis in original).

With respect to the robustness of the results when subjected to alternative statistical models required by Guideline Three, the Secretary concluded that "[t]he results of the adjustment procedure are broadly robust at an aggregate, national level." *Id.* at 2-54. However, he found three questionable areas where the adjustment methods concerned him: (1) imputation; (2) poststratification; and (3) the use of smoothing procedures.

The Secretary concluded that the imputation was statistically robust, but expressed a fear that variations of the assumptions underlying the imputation could have an effect on the apportionment of the House of Representatives. *Id.* at 2-48-2-49. With respect to poststratification, the Secretary observed that if poststratification had recognized the state of residence rather than the census division of residence as a factor, three states would have had significantly different counts. *Id.* at 2-49. Finally, moving to the robustness of smoothing, the Secretary concluded that the numerous decisions and techniques involved in the

two-stage process, including the discretionary selection of carrier variables, led to an impermissibly high level of uncertainty to employ the adjusted counts as a basis for reapportionment. *Id.* at 2-49-2-54. In short, the Secretary stated that the lack of comprehensive pre-specification, the possibility it raised for future political manipulation, and the uncertainty associated with the use of extensive statistical assumptions in the adjustment process led him to find that Guideline Three militated against adjustment.

In their attack on this conclusion, the plaintiffs first argue that the Secretary's concern over political manipulation of future censuses because of the lack of pre-specification is an inappropriate basis for making a determination under Guideline Three. While I tend to agree with that argument, I read the Secretary's discussion of future political manipulation as merely an explanatory note, underscoring why he thought that pre-specification was so significant. Because Guideline Three clearly mandated pre-specification, the Secretary's well-supported conclusion that the procedures were not adequately pre-specified supported his conclusion under this guideline.

Plaintiffs also argue that the Secretary required an impossible degree of pre-specification because some of the decisions to be made, including decisions relating to the smoothing process, were highly dependent on data to be collected during the PES, and therefore could not have been completely pre-specified. This argument ignores the fact that certain techniques were pre-specified and then changed later. *See Report of Special Advisory Panel Member Kirk M. Wolter* at 10. The Secretary's conclusion that pre-specification did not occur as contemplated by the guideline was justified.

Plaintiffs also belittle the Secretary's concern that even small changes in any of the assumptions underlying the statistical procedures of the adjustment could lead to a different apportionment of the House of Representatives. Deprecating his conclusion that this seriously compromised use of the adjusted counts, they contend that because the Secretary has conceded that small changes in the *census* methodology can move House seats as readily as small changes in the PES methodology, his concern under Guideline Three is illusory.

I disagree. The plaintiffs' reliance on the imperfections in the census to blink at similar uncertainties in the adjustment procedure misses the point that, under the rubric of the guidelines, the adjusted counts must satisfy certain criteria, regardless of whether the original enumeration could survive exposure to similar criteria. It must be remembered that under Guideline One, the presumption of accuracy runs in favor of the original census count. Because the Secretary's concerns over pre-specification and the robustness of adjustment data were legitimate, I find that the Secretary's conclusion under Guideline Three was not arbitrary or capricious.

Guideline Four

Guideline Four counsels that "[t]he decision whether or not to adjust the 1990 Census should take into account the effects such a decision might have on future census efforts." *City of New York II*, 739 F.Supp. at 769. With this in mind, the Secretary stated that he "d[id] not find compelling evidence in either direction regarding the effects of a decision on future individual motivations." *Decision* at 2-58. Weighing the effects that an adjustment might have on the

efforts of state, community, civic, and interest group leaders, the Secretary was concerned that "an adjustment [would] remove the incentive that these public officials and groups currently have to provide active support in achieving a complete count." *Id.* at 2-59. The Secretary found "unpersuasive" the contention that, even with an adjustment, local officials would retain a strong incentive to gather data, and "[found] no evidence indicating that local support would decrease as a result of a decision not to adjust the census." *Decision* at 2-59.

He went on to conclude that a decision to adjust could hinder the operations of the census in other ways, including disincentives for Congress to provide funding, and for enumerators to pursue their task energetically, and the possibility that adjustment could be distorted for partisan political purposes in future censuses. *Id.* at 2-60. Balancing all these fears, the Secretary concluded "that an adjustment would adversely affect future census efforts to a greater extent than any adverse effects of a decision not to adjust." *Id.* at 2-61.

Plaintiffs argue that it is futile to fret over censuses in the year 2000 and beyond in considering whether or not to adjust the 1990 census. This argument blithely ignores the express mandate of Guideline Four that the effect of the Secretary's decision on future censuses be considered. While I recognize that Guideline Four creates a potential tension with the constitutional requirement that the census be as accurate as practicable, under the circumstances of this case, that tension is minimal. Accordingly, I find that the Secretary's conclusion regarding Guideline Four was neither arbitrary nor capricious.

Guidelines Five & Six

Because the Secretary's conclusions based on Guidelines Five and Six are not challenged by the plaintiffs, I will only say that the conclusions reached by the Secretary in the Decision sufficiently considered those guidelines.[26]

Guideline Seven

Guideline Seven provides that "[t]he decision whether or not to adjust the 1990 Census shall take into account the potential disruption of the process of the orderly transfer of political representation likely to be caused by either course of action." *City of New York II*, 739 F.Supp. at 769. At an earlier stage of this litigation, I rejected a request to vacate Guideline Seven, finding that it, and Guideline Eight, might, "in a constructive fashion, help define the meaning of 'the most accurate census practicable,'" and concluded that, at least to that extent, they were permissible factors. *Id.* at 771.

In his consideration of Guideline Seven, the Secretary noted that the Clerk of the United States House of

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[26]Guideline Five provides that adjustment cannot violate the Constitution or any federal statute. The Secretary concluded that because he had reached a decision not to adjust based on other factors, "legal considerations did not provide a basis" for his decision. *Decision* at 2-65.

Guideline Six mandates that if adjusted counts could not be published by July 15, 1991, a determination would be made against adjustment. Although adjusted counts were ready to be published by July 15, 1991, the Secretary had concluded not to adjust, and so this guideline became moot.

Representatives had officially certified to each of the fifty states the number of seats allotted to that state for the 103rd Congress (convened in January 1993) based on census figures released on December 26, 1990, and that, as of May 1991, "some 20 states had already enacted either or both of their Congressional and State legislative redistricting plans." *Decision* at 2-71. The Secretary then went on to outline the disruption and delay that an adjustment would cause, particularly in those states where adjustment would change their allotted number of seats in the House of Representatives.

It should be remembered that Congress decreed in 1912 there be only 435 seats in the House of Representatives. We are, therefore, dealing with a zero-sum game; when one state gains a seat, another must lose one. If the adjustment were made, California and Arizona, for example, would each gain one seat in the House, while Pennsylvania and Wisconsin would each lose one. *Id.* at 2-72. The Secretary envisioned massive litigation over such a decision.

Ultimately, the Secretary concluded that Guideline Seven favored adherence to the census counts. He rejected the argument that non-adjustment is "inherently disruptive," as based on the question-begging premise that the adjusted counts are more accurate. He also concluded that, even if it were true that adjustment would result in a fairer distribution of funds, this consideration would pale in comparison to the disruption of political representation that would ensue from a decision to adjust, because "adjustment would not result in significant shifts in those funds." *Id.* at 2-75.

Plaintiffs assail the Secretary's Guideline Seven conclusion on two distinct grounds. First, they suggest that it is disingenuous for the Secretary to rely on the fact that the unadjusted counts were already being used for reapportionment and redistricting purposes, when the Stipulation required that any release of the unadjusted data before the Secretary's decision be accompanied by a notice advising recipients that they used the data at their own risk. None of this however, detracts from the fact that Guideline Seven explicitly required the Secretary to consider such disruption in deciding whether or not to adjust. Nor does it contradict the simple logic of the Secretary's argument that a decision in favor of adjustment on July 15, 1991, would have disrupted the reapportionment and redistricting that was then ongoing.

Plaintiffs also observe that the Secretary's conclusion that adjustment would not result in significant shifts in federal funds contradicts an earlier sentence in the *Decision* that city and state population "shares are very important because they determine ... how large a 'slice of the pie' of federal funds go to each city and state." *Decision* at 1-3-1-4. Plaintiffs are right. This, however, does not render the Secretary's decision invalid under Guideline Seven, because it involves a matter--the allocation of federal funds--only tangentially related to Guideline Seven, the basic thrust of which is the effect of a decision to adjust "on the orderly transfer of political representation." Accordingly, while there is an obvious inconsistency in the discussion accompanying the result, the plaintiffs have failed to show that the Secretary's conclusion under Guideline Seven was arbitrary or capricious.

Guideline Eight

Guideline Eight requires the Secretary to articulate the factors relied upon in reaching his decision, and also requires that "[t]he technical documentation lying behind [his] decision shall be in keeping with professional standards of the statistical community." *City of New York II*, 739 F.Supp. at 769. Because the plaintiffs do not specifically attack the Secretary's decision under this guideline, and because the Secretary concluded that application of this guideline neither favored nor militated against adjustment, I find that the Secretary's Decision complied with Guideline Eight.

* * *

Having thus parsed the guidelines, the Court concludes that the Secretary's conclusions under each guideline and his ultimate decision against adjustment cannot be characterized as arbitrary or capricious. The breadth of the guidelines left the Secretary enormous discretion. Plaintiffs have made a powerful case that discretion would have been more wisely employed in favor of adjustment. Indeed, were this Court called upon to decide this issue *de novo*, I would probably have ordered the adjustment.[27] However, it is not within my province to make such determinations. The question is whether the Secretary's decision not to adjust is so beyond the pale of reason as to be arbitrary or capricious. That far I cannot go.

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[27]Additionally, I note that in light of recent improvement in statistical tools and the practical benefits that the 1990 PES has provided, the use of adjustment in the next census is probably inevitable.

One of the central tenets of our founding fathers was that the role of the judiciary should be carefully delineated, especially when the controversy related to the management of the government. As Hamilton wrote:

> The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual and perhaps in its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department.

The Federalist No. 72 at 450 (Henry Cabot Lodge, ed., 1888).

The writings of Montesquieu and Locke bristle with the notion of separation of powers. But nowhere is it articulated more succinctly than in the Massachusetts Constitution:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Mass. Const. pt. 1, art. 30 (1780).

True, the APA sanctions judicial intervention when the parties feel aggrieved by a final administrative ruling.

But the APA tightly cabins judicial oversight, permitting judicial intrusion only when the administrative decision abuses reason. It is essential to the maintenance of judicial integrity that courts reviewing such determinations zealously adhere to the arbitrary and capricious standard of review. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971) (When reviewing agency action under the arbitrary and capricious standard of review, "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."); *Hudson Transit Lines v. United States ICC*, 765 F.2d 329, 336 (2d Cir.1985) ("while a reviewing court may not supply the basis for the agency's decision, lest it interfere with matters that Congress entrusted to the executive agency, it will uphold a decision of less than ideal clarity if the 'path which [the agency] followed can be discerned'") (quoting *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595, 65 S.Ct. 829, 836, 89 L.Ed. 1206 (1945)); *Connecticut Dep't of Children & Youth Servs. v. Department of Health & Human Servs.*, 788 F.Supp. 573, 577 (D.D.C.1992) ("Under this standard, the Court is not free to substitute its own judgment, but is limited to determining whether the agency has considered all relevant factors and whether the agency's decision is reasonable and in accordance with the relevant statute. Under the [APA], the standard of review is highly deferential to the agency."). As Cardozo has reminded us, "[t]he judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles." Benjamin N. Cardozo, *Nature of the Judicial Process* 141 (Yale Univ.Press, 1921).

Midst all the *sturm und drang*, after all is said and done, the question before the court distills to this: did the Secretary act reasonably? This, of course, depends mainly upon the evidence he had before him. In his testimony, Dr. Robert E. Fay, one of the principal statisticians at the Census Bureau (who, incidently, voted to adjust) pierced right to the heart of the case: "I told the Secretary that ... reasonable statisticians could differ on this conclusion." Tr. at 1909. The Court agrees, and therefore, concludes that the Secretary's decision not to adjust the 1990 census count was neither arbitrary nor capricious.

The PES Tapes

Plaintiffs also move to vacate a protective order, issued by Magistrate Judge Ross, governing certain computer tapes they got from the Government during discovery in this case. These tapes contain the adjusted census data at the block level and are the material that would have been released to the states if the Secretary had decided to adjust.[28] Plaintiffs argue that the Court should vacate the protective order because: (1) plaintiffs already possess the tapes, and, thus, release of the data would not violate any institutional confidence; and (2) release of the tapes is appropriate under 13 U.S.C. § 141(c), which requires the Secretary of Commerce to provide the states with data to be used in redistricting.

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[28]On July 15, 1991, the day the Secretary announced his decision, he also released to the public the adjusted census data at the national, state, county, and city levels, but not the block level. Subsequently the Department disclosed half of the adjusted block-level data to Congress.

When they opposed production of these tapes before Magistrate Judge Ross, the defendants asserted the "deliberative process" privilege as a basis for their refusal. The "deliberative process" privilege "protects from disclosure those agency documents which reflect 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y.1983) (quoting *Mobil Oil Corp. v. Department of Energy*, 520 F.Supp. 414, 416 (N.D.N.Y.1981)).

The privilege is a qualified or discretionary one that turns on a balance of competing policy claims. *See In re Franklin Nat'l Bank Sec. Litig.*, 478 F.Supp. 577, 582 (E.D.N.Y.1979). The privilege does not protect purely factual material. *Id.* at 581. Magistrate Judge Ross assumed arguendo, that the redistricting tapes reflected certain advisory opinions, but found that the benefit to be derived from protecting such information was outweighed by the benefit to accurate judicial fact-finding that would follow upon production of the tapes. Accordingly, she ordered the defendants to produce them, but, at the request of the defendants, also entered a protective order forbidding public disclosure. The Magistrate Judge was aware at the time of what she described as the "hotly contested Ninth Circuit litigation concerning disclosure of these same tapes."

I now have the result of that "hotly contested" Ninth Circuit case. *Assembly of California v. United States Dep't of Commerce*, 968 F.2d 916 (9th Cir.1992). There, the Department of Commerce was asked to release computer tapes containing all the block-level census data for California pursuant to a claim by the California State Assembly under

the Freedom of Information Act, 5 U.S.C. § 552(a) ("FOIA"). The Department of Commerce argued, as it does here, that the data should not be disclosed because of their pre-decisional and deliberative nature.

The district court rejected that argument and ordered the Department of Commerce to produce the data. *Assembly of California v. United States Dep't of Commerce*, 797 F.Supp. 1554 (E.D.Cal.1992). The Commerce Department appealed. Agreeing with the district court's findings that the data were neither pre-decisional nor deliberative, the Ninth Circuit affirmed the order that the tapes be released. 968 F.2d at 923.

A directly contrary result was reached by the Eleventh Circuit in *Florida House of Representatives v. United States Dep't of Commerce*, 961 F.2d 941 (11th Cir.1992). There, the Florida House of Representatives brought a FOIA action to compel the Department of Commerce to release all the adjusted block-level data for Florida. The district court granted summary judgment for Florida, and the Department of Commerce appealed. The Eleventh Circuit reversed, finding that "[b]ecause the adjusted census block level data are a subordinate's opinion and reflect the give-and-take of the deliberative process ... the data are deliberative, and in turn, within the scope of the deliberative process privilege." *Id.* at 950.

Recognizing this split in the circuits, and assuming *arguendo*, that the tapes reflect certain aspects of the deliberative process, I believe the Ninth Circuit has the better of the argument. Whatever interest the Department of Commerce may have had in the confidentiality of the block level counts, that interest was seriously diluted when the

Secretary released one half of all the data to Congress; and, whatever privacy survived as to the block level data for California was lost following the Ninth Circuit's decision.

Balanced against the slight residuary interest that the defendants may have in the confidentiality of the block level data is the public's interest in full access to judicial proceedings, especially where, as here, the dispute has sparked so much public interest. Because I believe that the balance weighs heavily in favor of disclosure under these circumstances, I vacate the protective order and permit the plaintiffs to use and to release to the public the computer tapes containing the adjusted block-level counts.

CONCLUSION

To sum up I: (1) find that the Secretary's decision not to adjust the 1990 census does not violate the APA, the Constitution, the Stipulation, or any statute; and (2) vacate the protective order governing the plaintiffs' use of the computer tapes containing the adjusted block-level counts.

While plaintiffs' counsel has illustrated that adjustment is statistically feasible, and would improve the quality of the counts for most purposes while ameliorating the profoundly disturbing problem of differential undercount, the Court cannot, on the record before it, supplant the Secretary's decision.

Finally, I would be remiss if I did not note the magnificent contribution that several law firms representing the plaintiffs have made in presenting this case to the Court. These firms, Cravath Swaine, and Moore, Arnold & Porter, and Stein, Zauderer, Ellenhorn, Frischer and Sharp have

devoted unusual talent and resources to this case on a pro bono basis. This is in the highest tradition of the Bar. I commend them.

SO ORDERED.

DATED: New York, New York
April 13, 1993

/s/ Joseph M. McLaughlin
JOSEPH M. McLAUGHLIN, U.S.C.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THE CITY OF NEW YORK,
THE STATE OF NEW YROK,
THE PEOPLE OF THE STATE OF
CALIFORNIA EX REL. JOHN K.
VAN DE KAMP, ATTORNEY GENERAL,
THE CITY OF LOS ANGELES,
THE CITY OF CHICAGO,
DADE COUNTY, FLORIDA,
THE U.S. CONFERENCE OF MAYORS,
THE NATIONAL LEAGUE OF CITIES,
THE LEAGUE OF UNITED LATIN
AMERICAN CITIZENS,
THE NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
MARCELLA MAXWELL,
DONALD H. ELLIOTT,
JOHN MACK,
OLGA MORALES,
TIMOTHY W. WRIGHT III,
RAYMOND G. ROMERO,
ANTONIO GONZALES, and
ATHALIE RANGE,

Plaintiffs,

-against-

88 CV 3474

UNITED STATES DEPARTMENT OF COMMERCE,

ROBERT A. MOSBACHER, as Secretary of the United States Department of Commerce,
MICHAEL R. DARBY, as Under Secretary for Economic Affairs of the United States Department of Commerce,
BUREAU OF THE CENSUS,

BARBARA EVERITT BRYANT, as Director of the Bureau of the Census,
GEORGE BUSH, as President of the United States, and
DONALD K. ANDERSON, as Clerk of the United States House of Representatives,

Defendants.

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MEMORANDUM AND ORDER

McLAUGHLIN, District Judge.

Census-taking has never been easy, and has rarely received favorable press. King David learned this the hard way. In First Samuel, the King directed his Census Bureau, one Joab, to "go through all the tribes of Israel From Dan to Bersabee, and number ye the people that I may know the number of them." When Joab had reluctantly counted as far as 800,000, David realized that, in some eyes, his task might be regarded as hubris on the scale of the Tower of Babel. He repented, lamenting: "I have sinned very much in what I have done; But I pray thee O Lord, to take away the iniquity of thy servant because I have done exceedingly

foolishly." The Lord turned a deaf ear for he sent David a pestilence and 70,000 died.

Caesar Augustus fared little better with David's descendant, Joseph, who, it will be recalled, had to travel with Mary to Nazareth for a census count, only to find there was no room for his tiny family in the inn. Christianity thus was founded in a stable--thanks to the census--and, according to Gibbon's *Decline and Fall of the Roman Empire*, it was Christianity that toppled the empire of the Caesars.

Colonial Americans seemed to have heeded these lessons, for no government enumeration of the colonies was ever undertaken. The Founding Fathers, however, were persuaded that the efficient functioning of a new democracy required a census. The original Constitution, therefore, required a simple head count of all Americans every ten years.[1] The task of conducting the first census was given,

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[1]Article I, Section 2, Clause 3 of the original Constitution provides:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within the Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

Section 2 of the Fourteenth Amendment further directs:

> Representatives shall be apportioned among the several States according to their respective numbers, counting

not surprisingly, to a patriot who had skipped the Constitutional Convention, Thomas Jefferson. Americans resisted on a grand scale, and matters have not improved in two hundred years.

For whatever reasons it goes against the American grain to submit to counting. In the 1980 count Census Bureau officials concede that they missed at least three million people. Statisticians and demographers claim this is a modest assessment. In any event, no one claims that the count is precise. Indeed, shots rang out as census takers recently approached one building in Brooklyn, thereby aborting further attempts to count that building's occupants.

Various statistical and sampling techniques have been employed, at least to some extent, by the Bureau of the Census to arrive at as accurate a figure as humanly possible, although the Bureau largely adheres to what it refers to as an "actual enumeration." Therein lies the rub, and this lawsuit. Plaintiffs claim that the actual enumeration the Bureau has used in the past and originally intended to use in the 1990 census is skewed to underestimate large blocks of minorities, with most of the undercounting occurring in the large urban areas. If this turns out to be true, the inevitable consequence will be under-representation in the Congress, and under-allocation of government revenues, grants, programs and the like. Plaintiffs argue that the 1990 census should be statistically adjusted to compensate for this "differential undercount" of minorities, if such an adjustment results in the most accurate census practicable.

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the whole number of persons in each State, excluding Indians not taxed.

FACTS

Plaintiffs began this suit in November 1988, seeking to enjoin the conduct of the 1990 census. Extensive negotiations were conducted in the summer of 1989, culminating on July 17, 1989 with an eleventh-hour stipulation (the "Stipulation") of the parties. The short-term effect of that Stipulation was to moot plaintiffs' motion for a preliminary injunction, halting the immediate course of the 1990 decennial census; the long-term effect of the Stipulation remains to be seen.

Plaintiffs now return to the Court, alleging defendants have violated that Order and Stipulation. Plaintiffs seek two-fold relief. First, plaintiffs ask for a declaratory judgment, declaring that a statistical adjustment of the federal census does not violate the Constitution or 13 U.S.C. § 195.[2] Second, plaintiffs seek a supplemental order from the Court: (1) invalidating the "guidelines" promulgated under the Stipulation for determining whether a practicable statistical correction would increase census accuracy; (2) ordering defendants to adjust the census, unless they demonstrate to the Court that the original enumeration is more accurate or that some other compelling reason prevents a statistical adjustment; and (3) directing defendants to fulfill their obligations to the Special Advisory Panel established under the terms of the Stipulation.

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[2]The statute provides:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Defendants reject all of plaintiffs' claims as meritless, and they argue that it is improper for the Court to entertain such imagined grievances at this juncture.

Defendants first argue that plaintiffs' claims for a declaratory judgment and for a supplemental order are not ripe for review. Essentially, defendants argue that, although the "guidelines" promulgated pursuant to the Stipulation are final, the Secretary of Commerce (the "Secretary") has not yet applied them. Thus, the Secretary may yet act under the guidelines to adjust the census in a manner that accords with plaintiffs' requests, thereby obviating the need for further relief. Defendants also contend that, since the Secretary has yet to decide whether an adjustment is constitutional, there is no decision ready for review.

Additionally, even if plaintiffs' claims were ripe, according to defendants, the decision whether to adjust is a political question. If so, plaintiffs' claims should be dismissed as nonjusticiable. Finally, if judicial review is proper and some form of relief is available at this time, defendants maintain that the specific relief requested is excessive and wholly unwarranted.

The Stipulation

Under the Stipulation, the Secretary retains all authority and decision-making power, "including without limitation the decision whether or not to adjust the 1990 Decennial Census." Stip. at 1. Defendants forthrightly concede in the Stipulation that a post-enumeration survey ("PES") and other adjustment operations defendants deem necessary will be conducted for the express purpose of achieving the most accurate count practicable.

To insure that this self-imposed mandate will be carried out properly, the Stipulation establishes two linchpin provisions. First, "[d]efendants agree that the Department will promptly develop and adopt guidelines articulating what defendants believe are the relevant technical and nontechnical statistical and policy grounds for decision on whether to adjust the 1990 Decennial Census population counts." Stip. at 3. In addition,

> Defendants shall establish ... an independent Special Advisory Panel (the "Panel") to advise the defendants on all matters relevant to the implementation of this Stipulation and, in particular, and without limitation, the guidelines ..., the application and achievement of the guidelines, the expedition with which defendants are proceeding toward decision on adjustment, and plans and schedules for the implementation of the Census and the PES in a manner that will result in the most accurate final census data at the earliest practicable time.

Stip. at 4-5.

Plaintiffs believe that defendants have failed to fulfill their explicit obligations under each provision.

DISCUSSION

I. POLITICAL QUESTION

Pursuant to the Stipulation, "plaintiffs reserve the right to challenge any of the guidelines ... adopted, omitted, implemented, or announced in connection with or arising out of this Stipulation." Stip. at 7. Despite this language,

defendants maintain that a challenge to the guidelines presents a nonjusticiable political question.[3]

Some actions of the Executive and some interaction between the executive and legislative branches are, in an Article III sense, inappropriate for judicial intrusion. *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (2d Cir.), *cert. denied*, 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974). As a function of separation of powers, cases which raise a political question are nonjusticiable and, by constitutional mandate, preclude judicial intervention. *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962). While sensitive to such limitations, this Court is satisfied that a challenge to the final guidelines, even as they relate to the Secretary's yet unmade decision on a census adjustment, does not present a political question.

The identical argument against justiciability arose in litigation, also brought by the City and State of New York, concerning adjustment of the 1980 census. *Carey v. Klutznick*, 508 F.Supp. 404 (S.D.N.Y.1980). The district court, rejecting defendants' suggestion of a political question, found:

> While *Carey v. Klutznick* involves a challenge to the census, and not precisely a challenge to congressional redistricting [as in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)], the former provides the foundation for apportionment and

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[3]Generally, a stipulation estops a party from subsequently asserting an inconsistent position. *Gall v. South Branch Nat'l Bank*, 783 F.2d 125, 127 (8th Cir.1986). Giving defendants the benefit of the doubt on consistency, however, the Court will rule on the merits of the objection.

> redistricting and, therefore, the precedents sustaining challenges to congressional redistricting should afford a predicate for finding the claims before the court justiciable.

508 F.Supp. at 411. The court therefore concluded that "both precedent and the intent of the Framers warrant the conclusion that the issues presented [in challenging the census enumeration] are justiciable." *Id.* The Second Circuit affirmed, adding, "We fully recognize that there is no power to review agency action that is 'committed to agency discretion by law,' 5 U.S.C. § 701(a)(2), but this is not one of those 'rare instances' where that exception may be invoked." *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir.1980) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971)). The Second Circuit thereafter stood by this finding of justiciability, choosing not to reexamine the issue. *Carey v. Klutznick*, 653 F.2d 732, 737 & n. 18 (2d Cir.1981).

The justiciability of plaintiffs' claim is established by precedent not only in this circuit, but in other jurisdictions as well. *City of Willacoochee v. Baldrige*, 556 F.Supp. 551, 557 (S.D.Ga.1983); *City of Philadelphia v. Klutznick*, 503 F.Supp. 663, 674 (E.D.Pa.1980); *Young v. Klutznick*, 497 F.Supp. 1318, 1326 (E.D.Mich.1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir.1981), *cert. denied*, 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 650 (1982).

II. RIPENESS

Defendants argue in the alternative that the Court lacks authority to hear plaintiffs' grievances at this time

because none of plaintiffs' claims are ripe for review. Defendants declare unripe plaintiffs' claim that the final census guidelines violate the Stipulation, as well as plaintiffs' demand for a declaratory judgment on the legality and constitutionality of an adjusted census.

A matter is ripe when there is "a genuine need to resolve a real dispute." 13A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3532.1 at 114 (1984). As a general proposition, ripeness is "very much a matter of practical common sense." *Continental Air Lines, Inc. v. CAB*, 522 F.2d 107, 124 (D.C.Cir.1974) (en banc) (citing *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). More specifically, however, a two-part test governs the issue because "ripeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 190-91, 103 S.Ct. 1713, 1716, 75 L.Ed.2d 752 (1983) (quoting *Abbott Laboratories*, 387 U.S. at 149, 87 S.Ct. at 1515).

A. *The Guidelines*

Defendants concede the guidelines "are final as far as they go." Def. Mem. in Opp. at 11. When agencies are involved, the administrative action must first be sufficiently final before it is fit for review. *Abbott Laboratories*, 387 U.S. at 149, 87 S.Ct. at 1515; *see also In re Combustion Equip. Assoc., Inc.*, 838 F.2d 35, 38 (2d Cir.1988). A determination of fitness also includes inquiry into whether the issue is purely a legal one, or whether a court could better resolve the issue in a more concrete setting, i.e., the

context of a specific attempt to apply the agency decision. *See In re Combustion Equip. Assoc., Inc.*, 838 F.2d at 38 (citing *Gardner v. Toilet Goods Assoc.*, 387 U.S. 167, 171, 87 S.Ct. 1526, 1528, 18 L.Ed.2d 704 (1967)); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C.Cir. 1986); *Riley v. Ambach*, 668 F.2d 635, 642 (2d Cir.1981).

If the issue surrounding agency action is a purely legal one "in which no further facts need be developed to facilitate a proper judicial decision, a *final* agency action may be fit for review even though it has never been applied or enforced by the agency in a concrete setting." *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1217 (D.C.Cir.1984) (emphasis in original). In fact, when final agency action involves a purely legal question, there is a threshold assumption of suitability for judicial determination. *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 915 (D.C.Cir.1985).

The second aspect in evaluating ripeness is the hardship involved in withholding court consideration. Contested agency action must have an impact on the challenging parties "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories*, 387 U.S. at 152, 87 S.Ct. at 1517; *see Toilet Goods Assoc. v. Gardner*, 387 U.S. 158, 164, 87 S.Ct. 1520, 1524, 18 L.Ed.2d 697 (1967).

It is quite clear that, under the facts of this case, the finality of the promulgated guidelines makes them ripe for judicial review. Unquestionably, the only outstanding issue is a legal one, namely, whether the guidelines as finally drafted satisfy defendants' obligations under the Stipulation.

No further facts or applications are necessary to give this controversy sharper focus.

This Court is aware that a window of opportunity will close with time, imposing direct hardship on plaintiffs. The final guidelines articulate the "grounds for decision on whether to adjust the 1990 Decennial Census population counts." Stip. at 3. That decision admittedly results from an ongoing process, one shaped and matured by the progress of the post-enumeration statistical survey. Moreover, the PES is fast approaching, scheduled to commence at the end of June.

Defendants are obligated to determine whether an adjustment, based upon PES results, satisfies the guidelines. *Id.* Most critically, in the event defendants decide not to adjust, defendants bear the burden to explain their decision in a detailed statement of reasons, pointing out which guidelines were not met. *Id.* at 4.

In this sense the guidelines, as mutually intended, lay the foundation and establish the framework for a principled decision by the Secretary. The right to challenge the guidelines, as discussed *supra*, was expressly reserved by plaintiffs in the Stipulation. Plaintiffs clearly have a right to prove, if they can, fatal cracks in the foundation; and they have that right now. The resulting hardship of postponing that challenge until after the Secretary's decision is an indefensible temporizing.

A stipulation, so ordered by the Court, is a contract negotiated between parties. *Berger v. Heckler*, 771 F.2d 1556, 1567 (2d Cir.1985); *see also United States v. Armour & Co.*, 402 U.S. 673, 681, 91 S.Ct. 1752, 1757, 29

L.Ed.2d 256 (1971); *Dotson v. HUD*, 731 F.2d 313, 318 (6th Cir.1984). The failure of an agency to act, in breach of a stipulation, poses a threat "sufficiently real and immediate to amount to an existing controversy entitling [plaintiffs] to enforce the decree." *Berger v. Heckler*, 771 F.2d at 1564.[4]

B. *Declaratory Judgment*

Whether plaintiffs' request for a declaratory judgment is ripe is more troublesome. Declaratory judgment actions should be entertained "when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and ... when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Fort Howard Paper Co. v. William D. Witter, Inc.*, 787 F.2d 784, 790 (2d Cir.1986) (citing *Broadview Chem. Corp. v. Loctite Corp.*, 417 F.2d 998 (2d Cir.1969), *cert. denied*, 397 U.S. 1064, 90 S.Ct. 1502, 25 L.Ed.2d 686 (1970) (quoting E. Borchard, *Declaratory Judgments* 299 (2d ed. 1941)).

The dispute involved must not be hypothetical or academic, or a request in the abstract for an advisory opinion; it must be "a definite, concrete controversy of sufficient immediacy to warrant the issuance of a declaratory judgment." *Broadview Chem. Corp.*, 417 F.2d at 1000; *see generally Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227,

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[4]For these reasons the Court also finds the Special Advisory Panel issues, *infra*, ripe for review.

240, 57 S.Ct. 461, 463, 81 L.Ed. 617 (1937).[5] Even when a declaratory judgment claim is justiciable, it is well settled that the decision to exercise declaratory jurisdiction rests with the discretion of the trial court. *Broadview Chem. Corp.*, 417 F.2d at 1000; *Muller v. Olin Mathieson Chem. Corp.*, 404 F.2d 501, 505 (2d Cir.1968).

According to plaintiffs, guideline five[6] prompted a swift and immediate request for declaratory relief. The Court sympathizes with plaintiffs' concern that, in raising the specter of doubt, defendants undermine a legitimate effort to achieve the most accurate census practicable through adjustment. Something not worth doing at all is certainly not worth doing well. The Court is confident, however, that it can allay at least some of those fears.

It is no longer novel or, in any sense, new law to declare that statistical adjustment of the decennial census is both legal and constitutional. This Court has already recognized that Article I, § 2 "require[s] that the census be

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[5]The Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force of a final judgment or decree and shall be reviewable as such. 28 U.S.C. § 2201; *see also* Fed.R.Civ.P. 57.

Where there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy, a case is ripe for declaratory relief. *Employers Ass'n v. State of New Jersey*, 601 F.Supp. 232 (D.C.N.J.), aff'd, 774 F.2d 1151 (3rd Cir.1985).

[6]See, *infra*, text accompanying note 9.

as accurate as practicable." *City of New York v. Dep't of Commerce*, 713 F.Supp. 48, 50 (E.D.N.Y.1989). *See also Karcher v. Daggett*, 462 U.S. 725, 730, 103 S.Ct. 2653, 2658, 77 L.Ed.2d 133 (1983) (congressional districts must be apportioned to achieve equal population "as nearly as is practicable"); *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir.1980).

Confronted with mirrored claims of illegality and unconstitutionality, the trial court in *Carey v. Klutznick*, *supra*, concluded "that defendants[']constitutional and statutory objections concerning the impropriety of employing statistical adjustments to compensate for the undercount [are] without merit." 508 F.Supp. 415. Decisions by other courts arrive at the same result. *See, e.g., City of Philadelphia v. Klutznick*, 503 F.Supp. 663, 679 (E.D.Pa.1980) (holding that "the Constitution permits the Congress to direct or permit the use of statistical adjustment factors in arriving at the final census results used in reapportionment" and also "that the Census Act permits the Bureau to make statistical adjustments in the headcount"); *Young v. Klutznick*, 497 F.Supp. 1318, 1332-33 (E.D.Mich.1980) ("[N]othing in the Constitution ... prohibits adjustment techniques."), *rev'd on other grounds*, 652 F.2d 617 (6th Cir.1981), *cert. denied*, 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 650 (1982); *see also Cuomo v. Baldrige*, 674 F.Supp. 1089, 1096 n. 13 (S.D.N.Y.1987).

This Court concludes that because Article I, § 2 requires the census to be as accurate as practicable, the Constitution is not a bar to statistical adjustment. I am similarly persuaded by the reasoning of *Carey v. Klutznick*, *supra*, as affirmed by the Second Circuit, that "in the area

of apportionment where important constitutional rights are at stake, the Census Bureau may utilize sampling procedures but only in addition to more traditional methods of enumeration." 508 F.Supp. at 415 (citing *Young v. Klutznick*, 497 F.Supp. at 1318).[7]

That said, it does not follow that any and all forms of statistical adjustments will be sanctioned. General principles, as Holmes observed, do not decide concrete cases. And this is not the occasion to prescribe what adjustments may or may not be made. The PES has not yet begun and the final form of the suggested statistical adjustment for 1990 remains to be seen. Reason and common sense dictate that, while constitutional and legal concerns will shape the end product, they should in no way hamper the effort. The concept of statistical adjustment is wholly valid, and may very well be long overdue. Whether it has been done legally and constitutionally can only be determined after the Secretary has decided how he wishes to adjust, if at all.

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[7]In so concluding, the district court considered 13 U.S.C. sections 141(a) and 195 *in pari materia*, nullifying neither provision and giving effect and meaning to both. 508 F.Supp. at 415. 13 U.S.C. § 141(a) provides:

> The Secretary shall ... take a decennial census of population ... in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

III. BREACH OF A STIPULATION

Stipulations so ordered by the Court, like consent decrees, are a hybrid. Being at once both contracts and judicial orders, "they are construed largely as contracts, but are enforced as orders." *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir.1985); *see United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n. 10, 95 S.Ct. 926, 934 n. 10, 43 L.Ed.2d 148 (1975); *SEC v. Levine*, 881 F.2d 1165, 1178 (2d Cir.1989); *Schurr v. Austin Galleries*, 719 F.2d 571, 574 (2d Cir.1983). The Court retains continuing jurisdiction over the decree to supervise and enforce it. *Berger v. Heckler*, 771 F.2d at 1568; *Wilder v. Bernstein*, 645 F.Supp. 1292, 1308 (S.D.N.Y.1986), *aff'd*, 848 F.2d 1338 (2d Cir.1988).

The Court discerns the meaning of such decrees from the four corners of the document. *United States v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757-58, 29 L.Ed.2d 256 (1971); *SEC v. Levine*, 881 F.2d at 1179; *Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd.*, 869 F.2d 34, 38 (2d Cir.1989). A court construing a stipulation is "not entitled to expand or contract the agreement of the parties as set forth in the consent decree." *Berger v. Heckler*, 771 F.2d at 1568; *see also Taitt v. Chemical Bank*, 810 F.2d 29, 33 (2d Cir.1987) ("Accordingly, we view the order ... as facilitating and effectuating, but not expanding, the intent of the parties as found in the four corners of the consent decree."); *SEC v. Levine*, 881 F.2d at 1179.

Deference is paid to the explicit language and the plain meaning of language in the decree, including normal usage of the words selected. *Berger v. Heckler*, 771 F.2d at 1568. The Court may not, in any case, "participate in any

bargaining for better terms." *Plummer v. Chemical Bank*, 668 F.2d 654, 655 n. 1 (2d Cir.1982).

Moreover, "[e]xtrinsic evidence ... may generally be considered *only* if the terms of the judgment, or if the documents incorporated in it, are ambiguous." *SEC v. Levine*, 881 F.2d at 1179 (emphasis added); *see also Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd.*, 869 F.2d at 38. None of the parties have argued that the terms of the Stipulation are ambiguous.[8]

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[8]Whether or not the "contract language" of a settlement stipulation is ambiguous is a question of law for the Court. *Burger King Corp. v. Horn & Hardart Co.*, 893 F.2d 525, 527 (2d Cir.1990); *Curry Road Ltd. v. Kmart Corp.*, 893 F.2d 509, 511 (2d Cir.1990); *Pantone Inc. v. Esselte Letraset, Ltd.*, 878 F.2d 601, 605 (2d Cir.1989); *see also Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 734 & n. 9 (2d Cir.1984) (disagreeing with trend toward making contextual inquiry to determine whether language is ambiguous).

> Language is ambiguous if it is:
> capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

Pantone, 878 F.2d at 606 (quoting *Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F.Supp. 987, 994 (S.D.N.Y.1968); *Burger King*, 893 F.2d at 527; *see also Adipietro v. Chubb Life American*, 736 F.Supp. 29, 33 (E.D.N.Y.1990). In reviewing the critical language of the Stipulation calling for the promulgation of agency guidelines and the establishment of a Special Advisory Panel, I conclude the Stipulation is not ambiguous.

A. *The Guidelines*

Under the agreed terms of the Stipulation, defendants promulgated the following eight final guidelines:[9]

> 1. The Census shall be considered the most accurate count of the population of the United States, at the national, state, and local level, unless an adjusted count is shown to be more accurate. The criteria for accuracy shall follow accepted statistical practice and shall require the highest level of professional judgment from the Bureau of the Census. No statistical or inferential procedure may be used as a substitute for the Census. Such procedures may only be used as supplements to the Census.
>
> 2. The 1990 Census may be adjusted if the adjusted counts are consistent and complete across all jurisdictional levels: national, state, local, and census block. The resulting counts must be of sufficient quality and level of detail to be *usable* for

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[9]Pursuant to the Stipulation defendants were required to publish proposed guidelines in the Federal Register by December 10, 1989 with a request for comments. Final guidelines were to be published in the Federal Register by March 10, 1989. Stip. at 3.

Defendants published twelve proposed guidelines with substantial "explanation" sections and a request for comments. Proposed Guidelines For Statistical Adjustment of 1990 Census, 54 Fed.Reg. 51,002 (Dec. 11, 1989). A second notice announced an extension to February 2, 1990 as the last date for comments. 55 Fed.Reg. 2,397 (Jan. 24, 1990). Final guidelines were published March 15, 1990. Defendants again included accompanying explanations, summarized the comments received and stated reasons for changes. Final Guidelines For Statistical Adjustments of 1990 Census, 55 Fed.Reg. 9,838 (March 15, 1990).

Congressional reapportionment and legislative redistricting, and for all other purposes and at all levels for which census counts are published.

3. The 1990 Census may be adjusted if the estimates generated from the pre-specified procedures that will lead to an adjustment decision are shown to be more accurate than the census enumeration. In particular, these estimates must be shown to be robust to variations in reasonable alternatives to the production procedures, and to variations in the statistical models used to generate the adjusted figures.

4. The decision whether or not to adjust the 1990 Census should take into account the effects such a decision might have on future census efforts.

5. Any adjustment of the 1990 Census may not violate the United States Constitution or Federal statutes.

6. There will be a determination whether to adjust the 1990 Census when sufficient data are available, and when analysis of the data is complete enough to make such a determination. If sufficient data and analysis of the data are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust the 1990 Census.

7. The decision whether or not to adjust the 1990 Census shall take into account the potential disruption of the process of the orderly transfer of political

representation likely to be caused by either course of action.

8. The ability to articulate clearly the basis and implications of the decision whether or not to adjust shall be a factor in the decision. The *general rationale* for the decision will be clearly stated. The technical documentation lying behind the adjustment decision shall be in keeping with professional standards of the statistical community.

Most of these guidelines are embellished with an accompanying "explanation". Plaintiffs argue that the guidelines violate the Stipulation, challenging that they do not set forth technical standards for decision, contain a built-in bias against adjustment and permit the Secretary to base his decision on impermissible factors.

The operative language of the Stipulation provides that the Department of Commerce would develop and adopt "guidelines articulating what *defendants* believe are the technical and nontechnical statistical and policy grounds for decision." Stip. at 3 (emphasis added). For better or for worse, the Department has done so. It is now clear that the guidelines are not those the plaintiffs would have authored; but it is equally clear that the right to directly contribute to substantive guideline language has been surrendered.

Quite simply, the Stipulation envisions a spectrum of acceptable guideline-making behavior by defendants. It is, by virtue of the Stipulation, defendants' duty to operate within that range. A range implies flexibility; but flexibility, as agreed upon by the parties, may be incorporated into a stipulation. *Canterbury Belts Ltd. v. Lane Walker Rudkin,*

Ltd., 869 F.2d at 38. It is also the law of this circuit that a court should avoid unnecessary intrusion into the administrative process. *Schisler v. Heckler*, 787 F.2d 76, 84 (2d Cir.1986). A court clearly oversteps its bounds when it requires that an agency, to fulfill obligations under a consent decree, use certain language in promulgating regulations. *Rice v. Heckler*, 640 F.Supp. 1051, 1059 (S.D.N.Y.1986) (citing *Berger v. Heckler*, 771 F.2d at 1578).

Defendants could have responded generously, quenching plaintiffs' understandable but nonetheless insatiable thirst to know everything in advance of the Secretary's decision. Defendants have not done so, offering instead the bare minimum. The only question for the Court is whether the guidelines satisfy an acceptable threshold. I conclude that, while the issue is indeed close, defendants have satisfied their obligations thus far.

Although plaintiffs interpret the guidelines as biased against adjustment, the Court does not view them that way. The Stipulation itself is not perfectly neutral, and that lack of neutrality sometimes works in plaintiffs' favor. For example, defendants are required to publish a detailed statement and explanation, but only in the event the Secretary decides not to adjust. Stip. at 4. The ultimate decision on whether to adjust, of course, must be fresh and unbiased, following the Secretary's *de novo* review of the record. That good faith discretion, I am convinced, is preserved under the guidelines.

Second, plaintiffs object to the failure of the guidelines to articulate sufficiently technical standards. In this regard, there has been much talmudic dissection by both sides of the Stipulation's requirement that defendants produce

"guidelines" as opposed to "standards". Rising above a semantic wrangling of words, which may wrongly re-work the benefit of the original bargain, the Court returns to the mandate of the Stipulation that defendants develop and adopt guidelines to articulate grounds for decision. Stip. at 3. While, again, defendants have not done this to plaintiffs' satisfaction, defendants have, in the Court's judgment, complied with the terms of the Stipulation.

I find most troublesome plaintiffs' third and final objection, that the guidelines allow the Secretary to rely on impermissible factors in making the critical decision on adjustment. It is more accurate to say, however, that the guidelines list valid factors for decision-making but that they are subject--like any set of rules--to being impermissibly contorted to justify a flawed final decision.

Plaintiffs' protection against such anticipated abuse is the added requirement under the Stipulation that defendants fully explain a decision not to adjust. Because defendants have chosen to contribute adequate but minimal performance to satisfy their obligations at this stage, defendants clearly incur a heavier burden to explain why no adjustment was made in the event the Secretary elects to proceed with an actual enumeration.

Admittedly, guidelines five through eight lend themselves easily to abuse. This Court has already granted, *supra*, a declaratory judgment on the constitutional and statutory facets of adjustment. That judgment effectively moots plaintiffs' concerns over guideline five.

Regarding guideline six, the Court reminds defendants that the Stipulation provides:

> If the Secretary determines to make an adjustment, defendants shall publish corrected 1990 Decennial Census population data *at the earliest practicable date* and, in all events, not later than July 15, 1991. If the Secretary determines not to make an adjustment, defendants shall publish *at the earliest practicable date* and, in all events, not later than July 15, 1991, a detailed statement of its grounds, including a detailed statement of which guidelines ... were not met and in what respects such guidelines were not met.

Id. at 4 (emphasis added). When the parties entered into the Stipulation, defendants affirmatively represented that the PES and adjustment-related operations were feasible goals as scheduled. Stip. at 2. Intentional inaction will not be tolerated. Defendants are expected, and indeed required, to honor their solemn commitments embodied in the Stipulation. *United States v. City of Yonkers*, 856 F.2d 444, 457 (2d Cir.1988), *rev'd on other grounds sub nom.*, ___ U.S. ____, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990).

I have considered, but rejected the option of vacating guidelines seven and eight. These guidelines may, in a constructive fashion, help define the meaning of "the most accurate census practicable." To that extent they are permissible factors. Again, the Court defers to the explicit language of the Stipulation providing that defendants will develop guidelines on what "they believe" to be the relevant grounds for decision. Defendants, however, are on notice, if it is not already clear, that backdoor attempts to evade their commitment will not be countenanced. *See City of Yonkers* at 457.

B. *The Special Advisory Panel*

Plaintiffs return to court, charging in part that defendants have breached obligations to the Special Advisory Panel. Specifically, plaintiffs allege that defendants have impermissibly "juggled" the accounting books, depleting the $500,000 panel fund with improper and inflated charges. I agree.

The Stipulation is quite precise on matters involving the eight-member advisory panel. Concerning money matters, the Stipulation requires that the Department of Commerce pay members a daily stipend for each day the panel meets and reimburse members for expenses. Stip at 6. The Department must also furnish the panel with appropriate meeting space, office facilities and clerical assistance. In addition, "Defendants shall make available to the Panel a fund of $500,000 against which each co-chair may draw ... for appropriate resources to ensure that Panel members can perform their mission." *Id.*

The problem is that defendants have charged against the fund all costs for stipends, reimbursements and office space. To some panel members the office space provided was lavish and unnecessary, especially in light of the initial rent which was well above $100,000. Ericksen Affidavit at 13. Even by the government's own estimates rendered in February of this year, more than $340,000 has been syphoned from the fund. *Id.* at Exh. L.

A plain reading of the Stipulation convinces the Court that defendants' duty to provide specific services, as catalogued by the explicit language, is in addition to the duty of establishing the $500,000 fund. Oddly enough,

defendants assured the Court at the hearing that money was not a problem and that, if it ran out, more could be found. Indeed, if appropriation ever did become a problem for defendants, the Court has resources of its own.[10]

CONCLUSION

Accordingly, the motion for a declaratory judgment is hereby granted with the understanding that statutory and constitutional concerns will remain relevant in regard to the final form of statistical adjustment. The motion for a supplemental order is granted in part and denied in part, as set forth herein.

SO ORDERED.

Dated: Brooklyn, New York
June 7, 1990

/s/ Joseph M. McLaughlin
JOSEPH M. McLAUGHLIN, U.S.D.J.

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[10] *Cf. Missouri v. Jenkins*, ___ U.S. ___, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990) (to give effect to a desegregation order, federal court could authorize school district to submit levy to local tax authorities for adequate funding, even though satisfying levy violated tax laws).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

THE CITY OF NEW YORK,
THE STATE OF NEW YORK,
THE PEOPLE OF THE STATE OF
CALIFORNIA EX REL. JOHN K.
VAN DE KAMP, ATTORNEY GENERAL,
THE CITY OF LOS ANGELES,
THE CITY OF CHICAGO,
DADE COUNTY, FLORIDA,
THE U.S. CONFERENCE OF MAYORS,
THE NATIONAL LEAGUE OF CITIES,
THE LEAGUE OF UNITED LATIN
AMERICAN CITIZENS,
THE NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
MARCELLA MAXWELL,
DONALD H. ELLIOTT,
JOHN MACK,
OLGA MORALES,
TIMOTHY W. WRIGHT III,
RAYMOND G. ROMERO,
ANTONIO GONZALES, and
ATHALIE RANGE,

Plaintiffs,

-against- 88 CV 3474

UNITED STATES DEPARTMENT OF COMMERCE,
C. WILLIAM VERITY, as Secretary of the
United States Department of Commerce,

ROBERT ORTNER, as Under Secretary for Economic Affairs of the United States Department of Commerce,
BUREAU OF THE CENSUS,
JOHN G. KANE, as Director of the Bureau of the Census,
RONALD W. REAGAN, as President of the United States, and
DONALD K. ANDERSON, as Clerk of the United States House of Representatives,

Defendants

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MEMORANDUM AND ORDER

McLAUGHLIN, District Judge.

Defendants move pursuant to Fed.R.Civ.P. 12(b)(1) to dismiss this action for want of subject matter jurisdiction. In the alternative, defendants move pursuant to Fed.R.Civ.P. 12(b)(6) or 56(b) for an order dismissing the Complaint. For the reasons discussed below, the motions are denied.

FACTS

The Census Bureau is about to embark on its constitutionally mandated task of conducting the 1990 census. Plaintiffs bring this action challenging the methodology of conducting that census. Defendants object that plaintiffs do not have standing to sue.

Plaintiffs are the States of New York and California; the Cities of New York, Los Angeles, Chicago and Houston; Dade County, Florida; the United States Conference of Mayors; the National League of Cities; the League of United Latin American Citizens; and the NAACP. The individual plaintiffs are citizens and taxpayers of the aforementioned cities and states.

On the standing issue, the Court accepts all material allegations of the Complaint as true. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). Since plaintiffs have had an opportunity to supplement the Complaint with affidavits, the Court must be satisfied that plaintiffs' standing adequately appears from the record.

DISCUSSION

I. STANDING

To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) "a personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), which amounts to a "distinct and palpable injury to himself," *Warth v. Seldin, supra*, 422 U.S. at 501, 95 S.Ct. at 2206; (2) that is redressable by the Court, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976); and (3) "a fairly traceable causal connection between the injury and the challenged conduct." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978).

A. *The Injury Element*

The decennial census determines, among other things, the apportionment of representatives in Congress and in state legislatures, the allocation of Electoral College votes in presidential elections, and the equitable distribution of federal funds for housing, education, and transportation. Although Article I, § 2 of the Constitution has been interpreted to require that the census be as accurate as practicable, *see Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983); *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), since 1940, the decennial census has consistently undercounted the American population. Minority groups comprise a large portion of the undercount. Plaintiffs seek to secure their constitutional and statutory rights to maintain both the efficacy of their votes and their entitlement to an equitable portion of federal funds.[1] Defendants argue that this claimed injury is not "concrete" and is based on mere speculation that the 1990 will be inaccurate.

To invoke the jurisdiction of this Court, plaintiffs must demonstrate more than a mere "conjectural" or

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[1]The Court need not and will not cloud this already complicated issue by seeking to determine whether the organizational plaintiffs--who allege loss of both political representation and federal funding have standing or whether the other injury alleged by plaintiff States and municipalities--deprivation of the use of accurate population figures for government planning--is a sufficient injury for standing purpose. Defendants make no serious challenge thereto. The Court only notes that the sufficiency of this latter injury is highly questionable because plaintiff States and municipalities are not required to use the Census Bureau's figures for any intrastate activity. *See Cuomo v. Baldrige*, 674 F.Supp. 1089, 1105-06 n. 31 (S.D.N.Y.1987).

"hypothetical" injury--they also must show that they have sustained or are in immediate danger of sustaining a direct injury as a result of the challenged conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983).

Defendants concede that plaintiffs' allegation of loss of federal funds satisfies the injury requirement of standing for the State and municipal plaintiffs. Because, however, a question has been raised whether the individual plaintiffs have standing to pursue their constitutional claims, *see FAIR v. Klutznick*, 486 F.Supp. 564, 569 n. 9 (D.D.C.), *appeal dismissed*, 447 U.S. 916, 100 S.Ct. 3005, 65 L.Ed.2d 1109 (1980), the Court will determine whether loss of political representation is sufficiently concrete for standing purposes.

Defendants argue that even if a disproportionate undercount occurs, and that it has an effect on the national apportionment of the United States House of Representatives, plaintiffs cannot demonstrate specifically where that effect will fall. In other words, defendants contend that no one, including plaintiffs, can determine in advance of the census which geographical area of the United States will be undercounted.

Plaintiffs, in response have submitted affidavits by persons who are former employees of the Census Bureau, tending to show (1) that, as defendants concede, there will be an undercount of minorities in the 1990 census; (2) that a disproportionate number of minorities reside in plaintiff States and municipalities; and (3) that as a result thereof, plaintiffs are now and will continue to be underrepresented in Congress.

I find that these factually supported allegations are sufficient to meet the requirement that plaintiffs suffer immediate threat of injury. The Court therefore concludes: that the individual plaintiffs have established a concrete injury in the form of alleged dilution of their votes; and that the State and municipal plaintiffs have established an injury in the form of loss of federal funding.

B. *Whether These Alleged Injuries Are Redressable By This Court*

Plaintiffs must also demonstrate that there exists a "'substantial likelihood' that the relief requested will redress the injury claimed." *Duke Power Co., supra*, 438 U.S. at 75 n. 20, 98 S.Ct. at 2631 n. 20. As indicated earlier, the specific injuries are loss of political representation and loss of federal funding. The relief plaintiffs request would require defendants to conduct a full-scale "post-enumeration survey" and take any other steps necessary to correct the 1990 census for undercounts and overcounts in population. The question thus distills to whether there is a "substantial likelihood" that a "post-enumeration survey" will create the most accurate 1990 census possible thereby ensuring fair representation in Congress and equitable distribution of federal funds.

Defendants point out that even if a post-enumeration survey were ordered by this Court, it is unlikely that this relief would create the most accurate 1990 census. Defendants assert indeed that a post-enumeration survey would actually create a less accurate 1990 census. Evidence submitted by defendants demonstrates that the relief plaintiffs request would require the Census Bureau to make major changes in the census now planned and employ a method of

adjusting the census that is untested and, hence, unproven. Defendants also note that the implementation of adjustment techniques will jeopardize their ability to meet their deadline, set by Congress at 13 U.S.C. § 141(b), to present a tabulation of total population by states to the President by December 31, 1990.

The latter argument, which addresses the operational feasibility of the adjustment, however, is a red herring. The nine-month time period between April and December set forth at § 141(b) is neither "sacred," as the Second Circuit recognized in *Carey v. Klutznick*, 637 F.2d 834, 837 (2d Cir.1980), nor "mandatory" as held by Judge Gilmore in *Young v. Klutznick*, 497 F.Supp. 1318 (E.D.Mich.1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir.1981), *cert. denied*, 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 650 (1982). It is not Congress' intent to sacrifice accuracy for the sake of timeliness. If the Census Bureau demonstrates that accurate adjusted figures cannot be compiled by December 31, 1990, this Court is empowered to grant it a reasonable extension of time.

Plaintiffs, on the other hand, submit evidence that adjustment of the census calculation *is* operationally feasible. *See* Plaintiff's Motion for Preliminary Injunction, Exhibit 24. Since most, if not all, of defendants' concern with the employment of a post-enumeration adjustment surrounds the operational feasibility of the adjustment, and since the adjustment can be made either within the statutory time frame or a judicial extension thereof, the dispositive question becomes whether a post-enumeration survey is technically feasible.

To support the technical feasibility of a post-enumeration survey, plaintiffs submit affidavits from Dr. Stephen Feinberg and Dr. Eugene Ericksen. These experts have concluded that correction methodology has been tested successfully, is feasible and would result in a substantially more accurate census. Plaintiffs also submit an affidavit from Dr. Barbara Bailar, who not only worked for the Census Bureau for 30 years, but was its Associate Director for Statistical Standards and Methodology. Dr. Bailar also opines that statistical adjustment is feasible. She is supported in that position by the Census Bureau Undercount Research Staff and each professional group from whom the Bureau sought an opinion--the Committee on National Statistics of the National Academy of Sciences; the Census Advisory Committee of the American Statistical Association and the Census Advisory Committee on Population Statistics.

The evidence submitted by defendants tending to contradict plaintiffs' proof of technical feasibility is so intertwined with their argument of operational *in* feasibility, that it is virtually impossible to cut this Gordian knot.

Needless to say, the dispute regarding technical feasibility is a classic battle of the experts. On this record, I conclude that plaintiffs have--at this juncture--sustained their burden of demonstrating that a substantial likelihood exists that a post-enumeration adjustment will produce the most accurate 1990 census possible.

C. *Causal Connection Between The Injury And The Challenged Conduct*

Plaintiffs finally must demonstrate that a causal connection exists between the injury alleged and the challenged conduct. *Duke Power*, *supra*, 438 U.S. at 72, 98 S.Ct. at 2629. With respect to the State and municipal plaintiffs, defendants concede that a causal connection does exist between the loss of federal funds and the failure to conduct a post-enumeration survey.

Defendants do not agree, however, that a causal connection exists between the loss of political representation by the individual plaintiffs and the challenged conduct. Defendants argue that general populations shifts, over which defendants have no control, break the chain of causation. Thus, whether loss of political representation *is caused by* a statistical undercount of the 1990 census is a question that cannot be answered with any degree of certainty. Defendants also claim that because the alleged injury is indirectly the result of government action, a greater showing of causation is required. *Simon*, *supra*, 426 U.S. at 44-45, 96 S.Ct. at 1927.

As discussed earlier in the context of the injury requirement, defendants do not seriously dispute that plaintiff States and municipalities, of which the individual plaintiffs are citizens and residents, have a disproportionate minority population that is chronically undercounted. It is absurd to suggest that a disproportionate loss of political representation will not follow in the wake of a miscount. In addition, evidence submitted by plaintiffs suggests that defendants recognize this inevitable result. In a May 1987 memorandum to defendant Ortner, his executive assistant

advises that "states with large minority populations would benefit from an adjustment and states with small minority populations would lose [Congressional] seats." Bailar Affidavit, Exhibit 23. It thus appears quite evident from the record before me that the presence of this so-called independent variable--general shifts in population--has a minimal, if any, effect on the loss of representation as compared to the conceded inability to count that population accurately in the first instance. Moreover, it simply does not follow that, because the same result can be produced by two different variables, the separate effect of each variable on that result cannot be measured independently.

Accordingly, even using a higher standard to determine causation, the Court concludes that the alleged loss of political representation can fairly be traced to defendants' failure to employ a post-enumeration adjustment.

Based on the foregoing, the Court concludes that plaintiffs' standing adequately appears from the record. Accordingly, defendants' motion to dismiss on this ground is denied.

II. SUMMARY JUDGMENT AND STANDARD OF JUDICIAL REVIEW

Defendants also seek to dismiss the Complaint on the grounds that it fails to state a claim for relief under the Administrative Procedure Act ("APA"), and that pursuant to Rule 56, summary judgment is appropriate. The Court will not reach the merits of the summary judgment motion. Clearly, the motion is premature. Plaintiffs conducted scant, if any, discovery before defendants filed this motion. Moreover, in support of its motion, defendants filed a

woefully incomplete statement pursuant to Local Rule 3(g) asserting only conclusory issues of law. Defendants failure to carry their burden of identifying, in the Rule 3(g) statement, the *facts* it alleges are undisputed constitutes grounds for denying the motion. The Court will, however, address the question of judicial review.

Defendants maintain that the APA precludes judicial review of the Department of Commerce's determination not to correct the 1990 census because such a decision is committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(2). Agency action based upon discretion falls beyond the pale of judicial review only when the action is based upon a statute that is drawn so sweepingly that a reviewing court has no "meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985). The statute upon which the Department of Commerce action is based, 13 U.S.C. § 141, provides that "[t]he Secretary shall ... take a decennial census of population ... in such form and content as he may determine." 13 U.S.C. § 141(a). Defendants believe that this statutory language gives the Secretary of the United States Department of Commerce unlimited and judicially unreviewable discretion to determine whether a post-enumeration adjustment for undercounting is appropriate.

A strong presumption exists that Congress intends judicial review of administrative agency action. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 2135, 90 L.Ed.2d 623 (1986). An exception to reviewability exists, in rare instances, when the agency action is committed exclusively to agency discretion

by law. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971). In determining whether § 141 operates to foreclose judicial review, this Court is not writing on a blank slate.

In *Carey v. Klutznick*, *supra*, an action challenging the 1980 census, the Second Circuit explicitly rejected the contention that a federal court is precluded by operation of § 701(a)(2) from reviewing the Secretary's action. In so concluding, the Second Circuit stated: "[plaintiffs] allege an impairment of their 'right to a vote free of arbitrary impairment' ... a matter which cannot, of course, be foreclosed from judicial review by operation of the Administrative Procedure Act." *Id.* 637 F.2d at 838-39 (citations omitted). Numerous other courts have come to the same conclusion. *See, e.g., City of Willacoochee v. Baldrige*, 556 F.Supp. 551, 555 (S.D.Ga.1983); *City of Philadelphia v. Klutznick*, 503 F.Supp. 663, 674-75 (E.D.Pa.1980); *Young v. Klutznick*, *supra*, 497 F.Supp. at 1335; *City of Camden v. Plotkin*, 466 F.Supp. 44, 51-53 (D.N.J.1978); *United States v. Little*, 321 F.Supp. 388, 391 (D.Del.1971); *Borough of Bethel Park v. Stans*, 319 F.Supp. 971, 976-77 (W.D.Pa.1970), *aff'd*, 449 F.2d 575 (3rd Cir.1971); *West End Neighborhood Corp. v. Stans*, 312 F.Supp. 1066, 1068 (D.D.C.1970).

Defendants' attempt to depreciate the *Carey* decision, by citing more recent circuit and Supreme Court cases, is unavailing. Only one of the cases upon which defendants rely concerns a claim of constitutional magnitude. In that one case, *Webster v. Doe*, --- U.S. ---, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988), the Supreme Court held that a decision by the director of the Central Intelligence Agency to fire an employee based on his homosexuality was unreviewable

because it was made pursuant to a statute that committed such decisions to the director's discretion. The *Doe* court found that the decision was unreviewable pursuant to § 701(a)(2)--in other words, that plaintiff could not complain that his termination was not--as set forth in the statute--"necessary or advisable in the interests of the United States." *Id.* 108 S.Ct. at 2054. The Court also held, however, that plaintiff could seek review of constitutional claims arising out of the director's decision pursuant to that statute. Thus, the *Doe* court concluded that § 701(a)(2) did not foreclose consideration of plaintiff's claim that the director's action deprived him of his right to privacy, due process and equal protection.

The *Carey* court as well as the overwhelming majority of cases considering this issue, have concluded that § 701(a)(2) of the APA is inapplicable to the census statute. I am not persuaded that the reasoning of *Doe* changes that result. I thus conclude that the Court is vested with power to review the Secretary's decision not to adjust the 1990 census. I turn now to what standard I will use for that review.

Following the second bench trial on the merits of the various challenges made to the 1980 census, Judge Sprizzo in *Cuomo v. Baldrige*, 674 F.Supp. 1089 (S.D.N.Y.1987), determined that the arbitrary and capricious standard of review was appropriate. Judge Sprizzo found that it would be "wholly inappropriate ... to substitute [his judgment] with respect to the feasibility of an adjustment for that of the [Census] Bureau unless, at a minimum, the plaintiffs proved that the Bureau's determination was unreasonable." *Id.* at 1105. Buried in a footnote, plaintiffs attempt to argue that the arbitrary and capricious standard should not be used.

Surprisingly, plaintiffs make this assertion although their fourth claim for relief alleges that the failure to adjust the census is arbitrary, capricious, contrary to law and an abuse of discretion.

Courts that have previously entertained actions challenging the method of conducting a decennial census have consistently used the arbitrary and capricious standard. *See Cuomo v. Baldrige*, *supra*, 674 F.Supp. at 1105; *Carey v. Klutznick*, 508 F.Supp. 420, 429-430 (S.D.N.Y.1980); *City of Philadelphia v. Klutznick*, *supra*, 503 F.Supp. at 675-76; *City of Camden v. Plotkin*, *supra*, 466 F.Supp. at 52-53; *Borough of Bethel Park v. Stans*, *supra*, 319 F.Supp. at 977; *West End Neighborhood Corp. v. Stans*, *supra*, 312 F.Supp. at 1068. No serious argument has been advanced by plaintiffs that would require departure from this precedent. I thus conclude that the arbitrary and capricious standard as set forth in § 706 of the APA will guide my review of the Secretary's determination.

Plaintiffs, in the same obscure footnote, suggest that it is premature to decide the standard of reviewability at this early juncture. I disagree. An early determination of this critical issue is essential to enlighten the parties in their preparation for discovery and for future hearings.

III. WHETHER THE COMPLAINT STATES A CLAIM UNDER THE CONSTITUTION

The final issue is defendants' motion to dismiss the Complaint on the ground that it does not state a claim under the Constitution.

In *Carey v. Klutznick*, *supra*, 637 F.2d at 839, the Second Circuit, quoting *Wesberry v. Sanders*, *supra*, stated that Article 1, § 2 of the Constitution means that "'as nearly as practicable one man's vote in a congressional election is to be worth as much as another's ... and that our Constitution's plain objective [is to make] equal representation for equal numbers of people the fundamental goal.'" Plaintiffs' claim that the Secretary's decision not to adjust the enumeration results in an undercount and a loss of political representation necessarily arises under Article 1, § 2.

Defendants' quarrel is based on the language of 13 U.S.C. § 141(a), which gives the Commerce Secretary discretion to determine the manner in which the census is conducted. Defendants argue that the Secretary, after considering the relevant alternatives, acted rationally in deciding not to adjust. Transparently, this argument begs the question that plaintiffs raise--whether that decision was rational or whether it was arbitrary and capricious. Having made this challenge, plaintiffs have stated a claim under the Constitution. Whether they ultimately prevail, of course, is a matter that cannot be resolved now.

Accordingly, defendants' motion to dismiss the Complaint and their motion for summary judgment are

hereby denied. Plaintiffs may renew their motion for a preliminary injunction upon the completion of discovery.

SO ORDERED.

Dated: Brooklyn, New York
April 21, 1989

/s/ Joseph M. McLaughlin
JOSEPH M. McLAUGHLIN, U.S.D.J.

The Clerk shall make copies of this Order and shall serve them upon the parties.

DEPARTMENT OF COMMERCE

Office of the Secretary

[Docket No. 91282-1181]

Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population

AGENCY: U.S. Department of Commerce.

ACTION: Notice of final decision.

SUMMARY: This is a notice of the final decision of the Secretary of Commerce on the issue of adjusting the 1990 census to correct for overcounts or undercounts of the population in the 1990 Decennial Census. The purpose of this notice is to inform the public of the decision and to explain the basis for the decision.

DATES: The decision is effective on July 15, 1991.

FOR FURTHER INFORMATION CONTACT: Michael R. Darby, Under Secretary for Economic Affairs and Administrator, Economics and Statistics Administration, Room 4848 Herbert C. Hoover Building, United States Department of Commerce, Washington, DC 20230, Telephone (202) 377-3727.

SUPPLEMENTARY INFORMATION: The Secretary of Commerce is required, pursuant to 13 U.S.C. 141, to

conduct a decennial census of the population of the United States. The population totals derived from the census provide the basis for the apportionment of seats in the United States House of Representatives, for state legislative redistricting, for determining district boundaries for county and city elections, and for the allocation of federal funds to state and local governments.

In 1987, the Secretary of Commerce decided not to plan for a statistical adjustment of the 1990 census. As a result, a lawsuit was filed by the city of New York and other parties seeking to compel the Department to plan for such an adjustment. Pursuant to an agreement between the parties in *City of New York. et al. v. Department of Commerce. et al.*, 88-Civ.-3474 (E.D.N.Y.), the Department undertook a *de novo* review of the adjustment issue in order to make a decision no later than July 15, 1991, on whether to adjust the 1990 census. The purpose of this notice is to inform the public about the Secretary's decision and the basis for the decision.

Final guidelines which aided the Secretary in his decision were published in the **Federal Register** on March 15, 1990 (FR vol. 55, no. 51, part III pp. 9838-9861).[1] They were intended to provide the framework for a balanced consideration by the Secretary of factors relevant to the decision.

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[1]Proposed guidelines were published in the **Federal Register** on December 11, 1989. The Court has previously considered and rejected a challenge to the guidelines. See *City of New York v. United States Department of Commerce*, 739 F.Supp. 767 (E.D.N.Y. 1990).

The census adjustment decision process was divided into several distinct phases. The first phase was the actual enumeration of the population. The second phase was the conduct of a post-enumeration survey, based on a probability sample of housing units. This sample provided data for two purposes: estimation of the net overcount or undercount of basic enumeration subgroups using capture-recapture methodology, and application of factors for the adjustment of the enumerated counts. The third phase of the process was a determination of the adequacy of the post-enumeration survey as an evaluation and adjustment tool. The fourth and final phase of the process was a decision on the adjustment question by the Secretary based on the published guidelines.

In making his decision, the Secretary relied on the advice of senior officials in the Economics and Statistics Administration, which includes the Census Bureau, as well as other senior advisors. The Secretary also relied on the individual recommendations of the eight members of the Special Advisory Panel appointed to provide independent advice to the Secretary on the adjustment question. In addition, the Secretary considered the public comments submitted to the Department pursuant to a **Federal Register** notice dated May 24, 1991, seeking comments on the question of whether the 1990 Census should be adjusted. The Department received approximately 650 public comments. These comments, as well as the appendices referred to in the following explanation of the decision, are available for public inspection in the U.S. Department of Commerce Central Reference and Records Inspection Facility, room 6020 Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Following is a detailed discussion of the adjustment decision and the basis for the decision. The discussion is in four sections: a summary statement, an analysis of the guidelines, an evaluation of the recommendations of the Special Advisory Panel and a statement of the decennial census procedures.

Dated: July 15, 1991.

Robert A. Mosbacher,
Secretary of Commerce.

SECTION 1--SUMMARY STATEMENT

Statement of Secretary Robert A. Mosbacher on Adjustment of the 1990 Census

Reaching a decision on the adjustment of the 1990 census has been among the most difficult decisions I have ever made. There are strong equity arguments both for and against adjustment. But most importantly, the census counts are the basis for the political representation of every American, in every state, county, city, and block across the country.

If we change the counts by a computerized, statistical process, we abandon a two hundred year tradition of how we actually count people. Before we take a step of that magnitude, we must be certain that it would make the census better and the distribution of the population more accurate. After a thorough review, I find the evidence in support of an adjustment to be inconclusive and unconvincing. Therefore, I have decided that the 1990 census counts should not be changed by a statistical adjustment.

The 1990 census is one of the two best censuses ever taken in this country. We located about 98 percent of all the people living in the United States as well as U.S. military personnel living overseas, which is an extraordinary feat given the size, diversity and mobility of our population. But I am sad to report that despite the most aggressive outreach program in our nation's history, census participation and coverage was lower than average among certain segments of our population. Based on our estimates, Blacks appear to have been undercounted in the 1990 census by 4.8%, Hispanics by 5.2%, Asian-Pacific Islanders by 3.1%, and American Indians by 5.0%, while non-Blacks appear to have been undercounted by 1.7%.

I am deeply troubled by this problem of differential participation and undercount of minorities, and I regret that an adjustment does not address this phenomenon without adversely affecting the integrity of the census. Ultimately, I had to make the decision which was fairest for all Americans.

The 1990 census is not the vehicle to address the equity concerns raised by the undercount. Nonetheless, I am today requesting that the Census Bureau incorporate, as appropriate, information gleaned from the Post-Enumeration Survey into its intercensal estimates of the population. We should also seek other avenues for the Bush Administration and Congress to work together and address the impact of the differential undercount of minorities on federal programs.

In reaching the decision not to adjust the census, I have benefitted from frank and open discussions of the full range of issues with my staff, with senior professionals from the Economics and Statistics Administration and the Census

Bureau, with my Inspector General, and with statisticians and other experts. Throughout these discussions, there was a wide range of professional opinion and honest disagreement. The Department has tried to make the process leading to this decision as open as possible. In that spirit, we will provide the full record of the basis for our decision as soon as it is available.

In reaching the decision, I looked to statistical science for the evidence on whether the adjusted estimates were more accurate than the census count. As I am not a statistician, I relied on the advice of the Director of the Census Bureau, the Associate Director for the Decennial Census and other career Bureau officials, and the Under Secretary for Economic Affairs and Administrator of the Economics and Statistics Administration. I was also fortunate to have the independent counsel of the eight members of my Special Advisory Panel. These eight experts and their dedicated staffs gave generously of their time and expertise, and I am grateful to them.

There was a diversity of opinion among my advisors. The Special Advisory Panel split evenly as to whether there was convincing evidence that the adjusted counts were more accurate. There was also disagreement among the professionals in the Commerce Department, which includes the Economics and Statistics Administration and the Census Bureau. This compounded the difficulty of the decision for me. Ultimately, I was compelled to conclude that we cannot proceed on unstable ground in such an important matter of public policy.

The experts have raised some fundamental questions about an adjustment. The Post-Enumeration Survey, which

was designed to allow us to find people we had missed, also missed important segments of the population. The models used to infer populations across the nation depended heavily on assumptions, and the results changed in important ways when the assumptions changed. These problems don't disqualify the adjustment automatically--they mean we won't get a perfect count from an adjustment. The question is whether we will get better estimates of the population. But what does better mean?

First, we have to look at various levels of geography--whether the counts are better at national, state, local, and block levels. Secondly, we have to determine both whether the actual count is better and whether the share of states and cities within the total population is better. The paradox is that in attempting to make the actual count more accurate by an adjustment, we might be making the shares less accurate. The shares are very important because they determine how many congressional seats each state gets, how political representation is allocated within states, and how large a "slice of the pie" of federal funds goes to each city and state. Any upward adjustment of one share necessarily means a downward adjustment of another. Because there is a loser for every winner, we need solid ground to stand on in making any changes. I do not find solid enough ground to proceed with an adjustment.

To make comparisons between the accuracy of the census and the adjusted numbers, various types of statistical tests are used. There is general agreement that at the national level, the adjusted counts are better, though independent analysis shows that adjusted counts, too, suffer from serious flaws. Below the national level, however, the experts disagree with respect to the accuracy of the shares

measured from an adjustment, The classical statistical tests of whether accuracy is improved by an adjustment at state and local levels show mixed results and depend critically on assessments of the amount of statistical variation in the survey. Some question the validity of these tests, and many believe more work is necessary before we are sure of the conclusions.

Based on the measurements so far completed, the Census Bureau estimated that the proportional share of about 29 states would be made more accurate and about 21 states would be made less accurate by adjustment. Looking at cities, the census appears more accurate in 11 of the 23 metropolitan areas with 500,000 or more persons: Phoenix, Washington, DC, Jacksonville, Chicago, Baltimore, New York City, Memphis, Dallas, El Paso, Houston and San Antonio. Many large cities would appear to be less accurately treated under an adjustment. While these analyses indicate that more people live in jurisdictions where the adjusted counts appear more accurate, one third of the population lives in areas where the census appears more accurate. As the population units get smaller, including small and medium sized cities, the adjusted figures become increasingly unreliable. When the Census Bureau made allowances for plausible estimates of factors not yet measured, these comparisons shifted toward favoring the accuracy of the census enumeration. Using this test, 28 or 29 states were estimated to be made less accurate if the adjustment were to be used. What all these tests show, and no one disputes, is that the adjusted figures for some localities will be an improvement and for others the census counts will be better. While we know that some will fare better and some will fare worse under an adjustment, we don't really know how much better or how much worse. If

the scientists cannot agree on these issues, how can we expect the losing cities and states as well as the American public to accept this change?

The evidence also raises questions about the stability of adjustment procedures. To calculate a nationwide adjustment from the survey, a series of statistical models are used which depend on simplifying assumptions. Changes in these assumptions result in different population estimates. Consider the results of two possible adjustment methods that were released by the Census Bureau on June 13, 1991. The technical differences are small, but the differences in results are significant. The apportionment of the House of Representatives under the selected scheme moved two seats relative to the apportionment implied by the census, whereas the modified method moved only one seat. One expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods. I recognize that the formulas for apportioning the House are responsive to small changes and some sensitivity should be expected. What is unsettling, however, is that the choice of the adjustment method selected by Bureau officials can make a difference in apportionment, and the political outcome of that choice can be known in advance. I am confident that political considerations played no role in the Census Bureau's choice of an adjustment model for the 1990 census. I am deeply concerned, however, that adjustment would open the door to political tampering with the census in the future. The outcome of the enumeration process cannot be directly affected in such a way.

My concerns about adjustment are compounded by the problems an adjustment might cause in the redistricting process, which is contentious and litigious enough without an adjustment. An adjusted set of numbers will certainly disrupt the political process and may create paralysis in the states that are working on redistricting or have completed it. Some people claim that they will be denied their rightful political representation without an adjustment. Those claims assume that the distribution of the population is improved by an adjustment. This conclusion is not warranted based on the evidence available.

I also have serious concerns about the effect an adjustment might have on future censuses. I am worried that an adjustment would remove the incentive of states and localities to join in the effort to get a full and complete count. The Census Bureau relies heavily on the active support of state and local leaders to encourage census participation in their communities. Because census counts are the basis for political representation and federal funding allocations, communities have a vital interest in achieving the highest possible participation rates. If civic leaders and local officials believe that an adjustment will rectify the failures in the census, they will be hard pressed to justify putting census outreach programs above the many other needs clamoring for their limited resources. Without the partnership of states and cities in creating public awareness and a sense of involvement in the census, the result is likely to be a further decline in participation.

In looking at the record of public comment on this issue, I am struck by the fact that many civic leaders are under the mistaken impression that an adjustment will fix a particular problem they have identified--for example, specific

housing units or group quarters that they believe we missed. It does not do so. It is not a recount. What an adjustment would do is add over 6 million unidentified people to the census by duplicating the records of people already counted in the census while subtracting over 900,000 people who were actually identified and counted. The decisions about which places gain people and which lose people are based on statistical conclusions drawn from the sample survey. The additions and deletions in any particular community are often based largely on data gathered from communities in other states.

The procedures that would be used to adjust the census are at the forefront of statistical methodology. Such research deserves and requires careful professional scrutiny before it is used to affect the allocation of political representation. Since the results of the evaluation studies of the survey were made available, several mistakes have been found which altered the certainty of some of the conclusions drawn by my advisors. The analysis continues, and new findings are likely. I am concerned that if an adjustment were made, it would be made on the basis of research conclusions that may well be reversed in the next several months.

It is important that research on this problem continue. We will also continue the open discussion of the quality of the census and the survey and will release additional data so that independent experts can analyze it. We must also look forward to the next census. Planning for the year 2000 has begun. A public advisory committee on the next census has been established and by early fall I will announce the membership of that committee. I have instructed the Census Bureau's Year 2000 task force to consider all options for the

next census, including methods for achieving sound adjustment techniques.

I give my heartfelt thanks to the many people who have devoted so much time and energy to this enterprise. The staff at the Census Bureau have demonstrated their professionalism at every turn through the last two difficult years. They executed a fine census and an excellent survey and then condensed a challenging research program into a few short months. I am deeply grateful for their help. Let me reiterate my sincere thanks to the Special Advisory Panel for their substantial contribution. The staff at the Department, especially those in the Economics and Statistics Administration, also deserve praise.

With this difficult decision behind us, we will commit ourselves anew to finding sound, fair and acceptable ways to continue to improve the census process. We welcome the leadership of Congress and other public officials, community groups, and technical experts in maximizing the effectiveness and minimizing the difficulties of the year 2000 census.

July 15, 1991.

SECTION 2--ANALYSIS OF THE GUIDELINES

Analysis of the Guidelines

Introduction

The 1990 census counts should not be changed by a statistical adjustment. This section explains my evaluation of the evidence relevant to each of the eight guidelines that I considered in reaching my decision. Each section begins

with a statement of the guideline and a reiteration of the explanation of the guideline contained in the March 15, 1990, **Federal Register** notice. A discussion of the guideline follows. The final section states my conclusions.

Summaries of my conclusions on each of the eight guidelines are set forth below.

Guideline One

Guideline One requires that convincing evidence be offered that the adjusted estimates of the population are more accurate than the census at the national, State, and local levels. In the absence of such evidence, the census counts are concluded to be the most accurate.

At the national level, it is likely that the PES-adjusted estimates reflect more accurately the total population and the racial and ethnic populations of the country. It appears equally clear, however, that the PES omitted large numbers of certain groups--notably black males. We have no information on the location of these persons. In addition, the PES and demographic analysis lead to sharply different conclusions about the accuracy of the census for several age/sex groups at the national level. Although these are not definitive disqualifiers at the national level, they do raise some question as to whether the adjusted figures are more accurate than the census count even at the national level.

The Constitution requires a census every 10 years not just to count the total number of people in the United States but to locate them so that political representation can be allocated to the states and the people in them in proportion to their numbers. I conclude that the primary criterion for

accuracy should be distributive accuracy--that is, getting most nearly correct the proportions of people in different areas. Improved numeric accuracy, although in itself desirable, cannot compensate for treating states and individuals less fairly.

At the State and local level the correct statistical analysis for both distributive and numeric accuracy simply has not been completed. The total error model indicates that the adjusted figures tend to be too high but generally closer in numeric terms to the true population than the census counts which tend to be too low. However, there is sufficient uncertainty about the true variance of the adjusted figures that even numeric accuracy has not been definitively demonstrated. The loss function analysis and hypothesis tests that have been prepared by the Census Bureau to date, although of uncertain reliability, do support the superior accuracy of the census counts versus the adjusted figures when we consider distributive accuracy--or fairness--and use reasonable estimates of the error variance of the alternative DSE. That is, for the Constitutional purposes of the census the available evidence is consistent with the census counts being more accurate than the adjusted counts. There is certainly not sufficient evidence to reject the distributive accuracy of the census counts in favor of the adjusted counts.

I conclude that, in accordance with Guideline One, the census counts are the most accurate count of the population of the United States at the State and local levels. While the preponderance of the evidence leads me to believe that the total population at the national level falls between the census counts and the adjusted figures, that conclusion is not relevant to the determination of distributive accuracy.

Thus this guideline weighs in favor of a decision not to adjust.

Guideline Two

I conclude that the considerations pointed to by Guideline Two tend to reject use of the adjusted figures and support use of the census counts. The adjusted figures--like the census counts--are consistent across all jurisdictional levels and of sufficient detail for all purposes. However, the adjusted figures do not appear to be of sufficient quality to be usable for reapportionment and redistricting. First, the distributive accuracy of the census counts is superior as concluded above in my review of the evidence on Guideline One. Furthermore, substantial evidence casts doubt on the homogeneity assumption underlying the entire synthetic adjustment methodology. Even if the tests discussed under Guideline One and based on the homogeneity assumption had proven favorable to adjustment, this evidence would weigh against adjustment. Instead, both considerations imply that the adjusted figures are not of sufficient quality to be usable for reapportionment and legislative redistricting. Thus, this Guideline weighs in favor of a decision not to adjust the census.

Guideline Three

I have previously concluded that the adjusted figures have not been shown to be more accurate than the census enumeration. That is all that is required under Guideline Three to conclude that the census may not be adjusted. There are, however, additional considerations under Guideline Three under which I also conclude the 1990 census should not be adjusted.

It has proved virtually an impossible task to prespecify the adjustment procedure. It is equally impossible to prespecify the Census procedure. However, in the adjustment procedure an individual or responsible group must make choices which have politically significant effects on the counts that can be transparent to those making the choices. This puts the counts at greater risk of being manipulated than the census. There is no evidence of unprofessional or political manipulation in the 1990 PES program.

The results of the adjustment procedure are broadly robust at an aggregate, national level. However, although various alternatives seem to distribute counts in roughly similar ways, small changes in methodology can move seats in the House. It is also true that small changes in the census enumeration can move seats in the House as well, but no individual involved in the enumeration process can predict how. That is not true for the decisions for adjustment that cannot be or were not prespecified.

One of the most problematic parts of the adjusted process was the bundle of statistical techniques contained in the smoothing process. These techniques relied heavily on statistical assumptions, resulted in large changes in adjustment factors, and may very well have led to an overstatement of the undercount. Thus, this guideline weighs in favor of a decision not to adjust.

Guideline Four

Based on the information available, I conclude that an adjustment would adversely affect future census efforts to a greater extent than any adverse effects of a decision not to

adjust. The evidence indicates that the controversy over adjustment is likely to have a negative effect on future censuses regardless of the outcome of the adjustment decision. I am concerned that an adjustment would reduce state and local support for future censuses, adversely affect the Department's ability to obtain appropriate funding for future censuses, adversely affect the quality of the work done in the future by temporary census enumerators who are essential in reaching the hard-to-count, subject the Census Bureau to partisan pressures, and create the possibility for political manipulation of future census counts. Thus, this guideline weighs in favor of a decision not to adjust.

Guideline Five

The question whether the chosen method of adjustment would violate the Constitution and federal statutes depends upon the substantive analysis of whether accuracy of the census is improved by an adjustment. Because there are other compelling substantive reasons not to adjust, legal considerations did not provide a basis for my decision.

Guideline Six

An adjustment to the census is a fundamental change in the way we count and locate the persons residing in the United States. I am deeply concerned that if an adjustment is made, it would be made on the basis of research conclusions that may very well be reversed in the next several months. That would be bad for the country and bad for the Census Bureau.

The results of the PES evaluation studies are not yet completely analyzed. Because of the compressed time

schedule imposed by the July 15 deadline, the analysis has not been subject to the full professional scrutiny that such important research requires and deserves. To the Census Bureau's great credit, the statistical tools used to calculate and evaluate the adjusted counts are at the cutting edge of statistical research. But such cutting edge research is not tried and true--it requires more thorough scrutiny before it can be used to affect the allocation of political representation and Federal funding.

Nonetheless, the demands of good research must be weighed against the need for a timely decision. In time we may find a way of combining the PES and the census to create counts that better reflect the absolute levels and the distribution of the population. There are sufficient data and analysis to support a decision not to adjust.

Guideline Seven

Any decision will result in some level of disruption through legal challenges. On balance, the record indicates that a decision to adjust would likely be more disruptive than a decision not to adjust. A decision to adjust would clearly cause disruption in those States that have early redistricting deadlines. The assertion that persons are denied their rightful claims without an adjustment assumes that the distribution of the population is improved by an adjustment. Based on the evidence, this assumption is invalid. Thus, this guideline weighs in favor of a decision not to adjust.

Guideline Eight

The requirements for this Guideline have been met. This Guideline does not weigh in favor of a decision either

way since the requirements of this Guideline could have been fully met if the decision had been to adjust.

Guideline One

The Census shall be considered the most accurate count of the population of the United States, at the national, State and local level, unless an adjusted count is shown to be more accurate. The criteria for accuracy shall follow accepted statistical practice and shall require the highest level of professional judgment from the Bureau of the Census. No statistical or inferential procedure may be used as a substitute for the Census. Such procedures may only be used as supplements to the Census.

Explanation

The mandate of the Census Bureau is to enumerate the population in a manner that assures that the count of the population is the best achievable given current methodology. As stated in the introduction, the assertion that a method involving statistical inference could lead to a more accurate enumeration warrants close scrutiny.

A set of adjusted counts would be based on a statistical inference that unaccounted for persons were present and that persons who were actually enumerated do not exist or were counted twice. Both determinations are based on a survey of a sample of similar blocks from locations across the country. Thus, the evidence, to be acceptable, must show convincingly that the count can be improved by statistical adjustment at national, state and local levels. In making this assessment, we will examine the

effects of the proposed adjustment on the accuracy of counts at all geographic levels.

Comparison of estimates of population size. The estimates of the size of the population from the original enumeration, the demographic analysis, and the post-enumeration-survey estimates will be compared to assess their consistency. The comparison will take into consideration the uncertainty inherent in the demographic analysis and post-enumeration-survey estimates. For the reasons explained in the introduction, the original enumerations will be considered to be more accurate for all geographic areas unless the evidence from demographic analysis and the post-enumeration survey demonstrates convincingly that the dual-system estimate is more accurate.

Accordingly, the Bureau of the Census shall carefully scrutinize and fully describe the size of any net undercount or net overcount inferred from demographic analyses of population sub-groups and the sources of any net undercount or net overcount of population subgroups inferred from the analysis of the post-enumeration survey.

Technical Grounds

Demographic Analysis. Estimates of the size of certain cohorts of the population are based on assumptions about or studies of the behavior of those populations. For some cohorts these assumptions have led to conclusions of net undercounts or net overcounts in several different censuses. The extent to which such conclusions result from specific assumptions will be described. Moreover, the extent to which these assumptions are warranted, and the sensitivity

of such conclusions to changes in these assumptions, will be assessed.

The potential sources of error in the demographic analyses the Bureau currently plans are:

Birth registration completeness.
Net immigration of undocumented aliens.
White births, 1915-1935.
Black births, 1915-1935.
Foreign-born emigrants.
Population over age 65.
Models to translate historical birth-record racial classifications into 1990 self-reported census concepts.

The Bureau will examine the effect of errors in each of these measurements on estimates of the net overcount or net undercount. These studies will yield ranges of uncertainty for the demographic estimates of the population which will in turn yield ranges of uncertainty for the net overcount or net undercount. The effect of uncertainty in each of these components will be cumulated into overall levels of potential error.

Post-Enumeration Survey. The capture-recapture method lies at the heart of the post-enumeration-survey models for estimating population coverage deficiencies. The use of this methodology to derive the net undercount or net overcount estimates will be clearly explained. The appropriateness of this methodology to the enumeration of the population will be assessed.

Like demographic analysis, the post-enumeration-survey adjustment mechanism relies on numerous assumptions. The extent to which these assumptions are warranted, and the sensitivity of the conclusions to changes in these assumptions, will be assessed.

Survey methods are based on randomly chosen samples that use statistical inference to estimate the population of the Nation and its components. Such estimates are subject to statistical variation within some range of values--that is, a replication of the process used to make the estimate (including taking the sample) may not lead to the same estimate as the original procedures. Thus, there is a likely range of estimates around the "true" count of the population that depends on the random sample chosen.

If the range of estimates likely to occur is small and near the "truth," then any particular estimate is close to the truth and, thus, acceptable as an approximation of the "truth." If the range is very large, then any particular estimate may not be close to the "truth," and the estimation process gives us little information about the "truth."

A relevant technical criterion related to uncertainty introduced by sampling is how small any possible range of dual-system estimates must be to conclude that any particular outcome of the dual-system estimation process is more accurate than the enumeration itself.

Because the post-enumeration survey itself is a sample, the quantified parameters of the deficiencies are themselves estimates and subject to statistical variability. This variability must be small enough to ensure that any

modification of the enumeration is an improvement over the unadjusted counts.

The post-enumeration survey serves two functions. The first function is to detect any deficiencies in the enumeration. For the post-enumeration survey to show convincingly that the enumeration is deficient, it must be clear that the deficiencies are not a result of problems in taking the post-enumeration survey. It follows, then, that the quality of the post-enumeration survey is a central concern in the decision whether to adjust.

The second function is to quantify any deficiencies attributed to the enumeration precisely enough to allow the enumeration to be modified in such a way that we are reasonably certain that the modified enumeration is more accurate than the original enumeration. Thus the post-enumeration survey must quantify the deficiencies of the enumeration precisely and accurately.

How much uncertainty in the measures of deficiency of the enumeration is acceptable?

(1) If the likely range of measures of deficiency would include outcomes that would call for no modification in the enumeration, then no modification would be done.

(2) The enumeration could be modified if the likely range of measures of deficiency would lead to potential modifications that would be substantially similar in terms of their impact on the counts of demographic groups, their impact on apportionment of Congress, and their impact on local population counts.

The quality of the net overcount or net undercount estimates that result from the post-enumeration survey depends on the quality of a series of operations used to gather and process the required data. The Bureau of the Census will undertake a series of studies to assess the statistical quality of the post-enumeration survey data. The results of these studies will yield measures of the precision and accuracy of the net overcount and net undercount estimates and a range of estimates for the net undercount and net overcount.

The current plans of the Bureau include investigation of the following sources of error for the dual system estimate of population size based on the post-enumeration survey and the census:

Missing data
Quality of the reported census day address
Fabrication in the P sample
Matching error
Measurement of erroneous enumerations
Balancing the estimates of gross overcount and gross undercount
Correlation bias
Random error

These and other component errors will be combined to produce an estimate of the overall level of error. In all evaluations, analyses will examine data for the population as a whole and for race, sex, Hispanic origin, and geographical detail.

Discussion

To certify a set of adjusted counts as the official counts of the population of the United States, one must accept the statistical inferences from a survey that there are persons who were unaccounted for by the census but who were actually present in a specific location on census day, that persons who were actually enumerated either did not exist or were counted twice, and that the same survey, when combined with census counts, can produce more accurate figures than the census enumeration alone. All these inferences are based on information from a sample of 377,381 persons in 171,390 housing units and group quarters in 5,290 block clusters. The people who are inferred to be missing from the census or erroneously enumerated in the census must then be correctly allocated to the specific blocks in which these mistakes were made. These blocks must be chosen out of the 4,830,514 inhabited blocks in the United States. Thus, acceptance of adjusted counts as more accurate requires not only that the counts themselves be shown to be more accurate, but that the distribution of those counts across the United States reflect more accurately the distribution of the population. This is the burden of proof imposed by Guideline One on any decision to adjust the census.

There are three population measurement techniques that play a role in making these statistical inferences. The first is the census enumeration. This was an effort to count each and every person residing in the United States on April 1, 1990. The second is the Post-Enumeration Survey (PES). This is the survey mentioned in the preceding paragraph that was taken several months after census day, independently of the census. An attempt is made to match the persons

surveyed in the PES back to records in the census and to match persons in the census to the PES. From the results of this matching process, and a complex web of statistical models, inferences can be made about the number of persons missed by the census and their location. It is the quality of these inferences that is at issue. The third technique is called demographic analysis (DA). DA makes an independent estimate of the population at a national level from administrative records. It can be used to calibrate the results from the census or PES. DA calculates the population from the number of births, number of deaths, the number of immigrants, and the number of emigrants. It builds up a count of the population of the United States from birth and death certificates, immigration records and other sources. Like the census and the PES, DA is also an imperfect measure, so the quality of the inferences made from it are in question as well.

In the course of the discussion of this guideline, various aspects of these three complex processes will be explained and discussed. A detailed explanation can be found in Section Four of this report. We begin by comparing the national counts found in 1990 using these three methods.

A Comparison of the Counts at the National Level Using Three Methods

The national total count from the census enumeration is compared, in Table 1, Appendix 14, with the corresponding total in the proposed adjusted counts based on the PES and also with the corresponding estimates based on DA. The census count is 2.07% or 5,269,917 persons less than the PES estimate. There is evidence of racial, ethnic,

and sex differential undercounts in the census when compared to the PES-based estimates. The count of black males in the census was 5.37% or 804,233 persons lower than the population inferred from the PES. The count of black females in the census was 4.33% or 715,543 persons lower than the PES estimated. For non-black males the census count was below the PES estimate by 2.02% or 2,205,443 persons and for non-black females the differential was 1.36% or 1,544,050 persons.

Estimates of national population totals are derived by DA based primarily on administrative records. Demographic analysis estimates provide national totals only and cannot be used to locate people as census counts are required to do. Many argue that the DA estimates broadly corroborate differential undercounts implied by PES-adjusted counts;[1] however, like the minority on the Undercount Steering Committee,[2] I find there are some important and puzzling differences. First, the overall undercount rate inferred from comparing the census to DA (1.85%) is smaller than that inferred from the PES (2.07%). At an aggregate level, the demographic analysis is thought to be more inclusive since

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[1]See appendix 7: Bryant, Barbara E., Director of the U.S. Bureau of the Census, "Recommendation to Secretary of Commerce Robert A. Mosbacher on Whether or Not to Adjust the 1990 Census," June 28, 1991, [hereafter Bryant] page 16. See also Appendix 4, "Report of the Undercount Steering Committee," U.S. Bureau of the Census, June 21, 1991, [hereafter Undercount Steering Committee] page 4. See also Appendix 3: Ericksen, Eugene P., Estrada, Leobardo F., Tukey, John W., Wolter, Kirk M. "Report on the 1990 Decennial Census and the Post-Enumeration Survey," Members of the Special Advisory Panel, June 21, 1991, [hereafter Ericksen, *et al.*,] page 10.

[2]Undercount Steering Committee, page 4.

the PES and census will miss people who are difficult to survey. Thus the estimate of the population from the PES was expected to be lower than the DA estimate. It is not. The PES estimated total population is 0.23% higher than the DA estimate. More detailed analysis shows that the PES and DA estimates are not far apart in a statistical sense.[3] Nevertheless, the fact that the direction of difference is the opposite of what statistical experience would have led us to expect raises a troubling question about the relationship between the two methods.[4]

Another example of a gross inconsistency between the PES and DA is that an adjustment would add 1,055,826 more females than DA indicates should be added. If DA were in fact correct, and the enumeration were adjusted, the official population counts would have a 0.82% overcount of females imbedded in it.

The third disturbing comparison between the PES and DA undercount rates is that all groups of black males (except those aged 10-19) are substantially undercovered by the PES relative to DA. This results in PES-based undercount rates that are substantially smaller than the DA rates. This is the

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[3]The 95% confidence interval for the overall PES undercount rate is from 1.23% to 2.20% and the judgmental 95% confidence interval for the overall demographic undercount rate is from 1.6% to 3.4%. A confidence interval gives the range of statistically plausible values. The "95%" refers to the notion that one is 95% sure this interval has captured the true, but unknown, value. See table 2 in appendix 14.

[4]As will be discussed later, there are measured biases in the production adjustment estimates. When corrections are made for these measured biases, the overall undercount rate measured by the PES falls below that of DA.

type of result that is usually expected in comparing the PES and DA.[5] An adjustment based on the PES would add 804,233 black males to the population. According to demographic analysis, the number of black males that should be added to the population is 1,338,380. Thus the PES-based adjustment would be omitting 534,147 black males according to DA. For black females the PES adjustment would add 29,390 fewer persons than DA indicates should be added. If we accept the DA as being closer to the truth, we could not appropriately add the persons the PES missed to the count because we have no way of locating them.

Some will argue that "going part way" toward remedying the undercount of black males is better than doing nothing.[6] The trouble with this argument is that it ignores the fact that increased accuracy for census counts means not only increased accuracy in the level of the population, but also increased accuracy in the distribution of the population in states and localities. In particular, for the primary uses of the census--apportionment and redistricting--the share or fraction of the total population in a given state, city or precinct is critical. It is this fraction that determines political representation and the amount of Federal funds

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[5]The technical term for this is correlation bias.

[6]See Undercount Steering Committee, page 4; See also appendix 3: Ericksen, Eugene P. "Recommendation on 1990 Census Adjustment," Member, Special Advisory Panel, June 21, 1991, [hereafter Ericksen] page 2; See also Appendix 3: Estrada, Leobardo F. "Recommendation on 1990 Census Adjustment," Member, Special Advisory Panel, June 21, 1991, [hereafter Estrada] page 14; See also Appendix 3: Wolter, Kirk W. "Recommendation on 1990 Census Adjustment," Member, Special Advisory Panel, June 21, 1991, [hereafter Wolter] page 4.

allocated across political jurisdictions. The paradox is that even if you improve the accuracy in the level of the population in any given city by adding at least some of the people missed in the census, you do not necessarily improve and can worsen accuracy in the share of the population in that city. This point is explored further in the section on how accuracy is measured.

Special Advisory Panel Member Wachter estimates that the number of people missed by both the census and the PES may be as high as half-a-million.[7] We do not know where these people are.[8] The implicit assumption that we would be making if we went ahead and adjusted the count is that they are spread over the country in the same way as the post-adjustment population. Such an assumption has no empirical foundation. There is no doubt that there is a fundamental deficiency in the count, but there is also a fundamental deficiency in the PES. It is not clear that the adjusted counts will accurately reflect relative populations in particular jurisdictions. As Wachter states:

When we try to gauge the relative sizes of two states or cities or counties or districts [after an adjustment], we must always worry that there are enough more of the unreached in one than in the other to reverse the judgment about relative size that the adjusted counts would lead us to make.[9]

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[7]See appendix 3: Wachter, Kenneth W. "Recommendations on 1990 Census Adjustment," Member, Special Advisory Panel, June 17, 1991, [hereafter Wachter] page 8.

[8]The implications of this for accuracy are explained at length below.

[9]Wachter, page 8.

To further complicate matters, at the national level there are instances where a PES-based adjustment to the census would move subpopulation totals in the opposite direction from that indicated by DA:

• An adjustment based on the PES will add 180,318 non-black males aged 10-19, while the DA indicates 136,908 should be deleted, a difference in the wrong direction of 317,226.[10]

• An adjustment based on the PES will delete 91,631 males over the age of 65, while DA indicates that 192,950 should be added, a difference in the wrong direction of 284,541 persons.[11]

• An adjustment based on the PES will add 375,053 females aged 10-19 when DA indicates that 7,141 should be deleted, a difference of in the wrong direction of 382,191.[12]

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[10]The third table in appendix 14 shows that the 95% PES confidence interval for the undercount rate for this group is (0.53, 1.85) with a point estimate of 1.19. Demographic analysis shows a confidence range of (-1.21, 0.65) with a point estimate of -0.92. Thus neither estimate falls in the other's confidence range.

[11]The third and fourth table of appendix 14 show the confidence intervals for undercount rates for blacks and non-blacks separately. For non-blacks in this group, the confidence intervals for the two methods do not intersect, with the PES confidence interval completely less than zero and the DA confidence interval completely greater than zero. For blacks as well, the two intervals do not overlap. The PES spans zero, the DA is completely greater than zero.

[12]In appendix 14 the confidence intervals for this group are given for blacks and nonblacks separately. For non-blacks the intervals for the PES and DA do not overlap. For blacks they do.

• An adjustment based on the PES will delete 245,253 females over the age of 45 while DA indicates 146,255 should be added, a difference of 391,508 persons in the wrong direction.[13]

Another grouping of the population that plays a key role in the adjustment process is called a post-stratum. To calculate the adjusted population estimates, the population is broken down into 1392 groups called post-strata. Every individual in the United States fits into one, and only one, of these post-strata. These post-strata are based on census division, type of place of residence, tenure of residence, race, Hispanic ethnicity, sex, and age. These are the smallest groupings of people for which an undercount rate is estimated by the Census Bureau. When post-strata for similar types of persons are combined (for example, all post-strata with blacks, or all post-strata for people age 30-44) the results are largely consistent with expectations.[14] However, there is a lot of variation across the post-strata for similar types of people. Wachter offers intriguing evidence that "the story of census coverage, at a level of fine detail, is more complicated than one would hope."[15] For example, if one looks at all the post-strata for blacks, 25% of them show an overcount rather than an undercount.[16] Thus the broad, national-level aggregations of undercount by race,

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[13]The confidence intervals for the four component groups are given in tables 1 and 2 of appendix 14. The intervals are wide enough that the differences may not be statistically significant.

[14]Wachter, pages 9-10.

[15]Wachter, page 10.

[16]Wachter, page 10.

ethnicity, sex, and age mask a large amount of diversity within those groups. It is therefore overly simplistic to conclude that the census generally results in an undercount for all members of any particular group.

This section has given an aggregate picture of the population using three different measurement instruments--the census, the PES, and DA. It is clear that the census suffers from an undercount, that the undercount is differential across race, ethnicity, and age, but that there is diversity within these groups. There are substantial and statistically different pictures of the population that are drawn by these three methods even at the national level. This is worrisome in and of itself. An adjustment based on the PES will be at face-value substantially different from our demographic estimates at the most aggregate levels. Whether it is an improvement depends not on its ability to add people and to subtract people from the census, but, rather, on its ability to add them and subtract them from the right places.

The Quality of the Census Enumeration

Special Advisory Panel Members Ericksen, Estrada, Tukey and Wolter all condemn the census as being fatally flawed.[17] I concede the census' imperfections, but the critical inquiry under this guideline is not how flawed the

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[17]Ericksen, page 2; Estrada, page 2; See also Appendix 3: Tukey, John W. "Recommendation on 1990 Census Adjustment," Member, Special Advisory Panel, June 18, 1991, (hereafter Tukey), page 3; Ericksen, *et al.*, pages 4-9.

census is, but whether the PES can fix it.[18] Census taking is a complex task that must be completed within a short period of time. In an operation employing 350,000 temporary workers spread over more than 400 offices across the country, quality control is a real problem. The management information system the Census Bureau installed allowed the Census Bureau and the panelists to have access to the type of data panelists report. Thus, while identifying the flaws in the census is important for planning the next one, it simply begs the question that Guideline One poses: Is there convincing evidence showing that the adjustment is more accurate than the enumeration?

The Quality of the Alternative Measurement Tools

In considering whether to adjust the population for undercounts, the quality of the tools used to measure and then make an adjustment is important. The two methods that are alternative to the census are DA and the PES.

Demographic Analysis

Demographic analysis is a count of the aggregate population that is not based directly on any census. Instead it is built from administrative records including birth and death certificates, immigration records, and medicare records, among others. Limitations in record-keeping limit demographic breakdowns to those by age, sex, and black/non-black. There is no uniform reporting of ethnicity (*e.g.*, Hispanic origin) or the race of children of biracial couples. Even the same person might be reported as having

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[18]Nevertheless, this was at least the second-best census ever conducted.

different characteristics on birth and death records. Because we do not keep records of movements of individuals within the United States this analysis can only be done at the national level.

Furthermore, demographic estimates of the population are continually being changed. No demographic estimates are ever final, as new sources of data and statistical models are used presumably to improve the inferences made about the population. (For example, as a result of the demographic analysis for this census, the estimates of the 1980 population were still being changed as late as last month.) This year the Census Bureau undertook a series of investigations into the quality of the demographic estimates. An important improvement in the estimates was the first attempt to characterize the uncertainty inherent in them with uncertainty intervals about the point estimates. These improvements are reported in the demographic reports D1-D11.[19] Because demographic analysis will not be used in any adjustment, any detailed discussion of its results is foregone. Nevertheless, it is worth noting that the uncertainty intervals have been used in the previous descriptions of consistency of the various estimates of the population.

In an article in *Science*, David Freedman, Professor of Statistics at the University of California at Berkeley, discusses the limitations of DA in some detail.[20] Racial

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[19]See the executive summary of these evaluation projects in appendix 2.

[20]See Appendix 13: Freedman, David A. "Adjusting the 1990 Census," Science, Volume 252, May 31, 1991, [hereafter Freedman] pp. 1233-1236.

classification procedures vary widely. Incomplete coverage of vital statistics is a problem especially for certain age groups, with further variation by race and sex. In fact the census is used to adjust the birth certificate data that go into DA before DA is used to evaluate the census. Wachter also notes the complexity of DA,[21] and the fact that it is rightly subject to continual revision. He is particularly uncertain about the correctness of the estimates of immigration. He applauds the innovations in the 1990 DA, but quotes his colleague, Wolter, as saying: "The corrections that have been made are indicative of the corrections yet to be named."

The Post-Enumeration Survey and Dual-System Estimates

The Post-Enumeration Survey serves two related purposes. It is used as a measure of the accuracy of the census and it is used together with the census and statistical methods to generate adjusted counts. These adjusted counts are technically referred to as dual-system estimates (DSE). To evaluate the quality of the PES a series of 21 studies was done.[22] There are two questions that the Census Bureau intended to answer with the evaluation of the quality of the PES. First, whether the survey itself was of high enough quality in design and operation to be able to tell us something reliably about the faults of the census. Second, whether the adjusted counts or DSE were significantly more accurate than the census.

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[21]Wachter, pages 14-16.

[22]See the executive summary of these evaluation projects in appendix 2.

The Quality of the PES Survey

The 21 Census Bureau studies were designed to address the issues of quality in the PES and the DSE, some in a quantitative way, some in a qualitative way. They generated volumes of data that have not yet been fully analyzed or understood. Nevertheless, they have generated the basic material on which a judgment must be made regarding a possible adjustment of the census and the effect of that adjustment on the accuracy of the census.[23] In addition some of the panelists did their own studies on various aspects of PES quality. The broad picture that emerges from the analysis of these studies is that the PES was a generally high-quality survey that was well-executed.[24] There is little doubt that the PES detected an overall undercount in the census and a differential undercount at the national level by race and ethnic origin. But there are some problematic areas and disagreements among experts inside and outside the Census Bureau that have an impact on assessing the quality of the adjusted counts generated from the PES.

Missing data. The PES generates its estimate of the undercount by trying to match households it has information about to households in the census. A household survey in the PES that is matched to the census record of that residence means there was no undercount of that household.

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[23]Under Guideline Six, as explained later, "[i]f sufficient data and analysis of the data are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust the 1990 census."

[24]See for example Ericksen, *et al.*, pages 12-16 for a good summary of the merits of the PES as a survey. Also see Wachter, page 2.

A non-match means there was an undercount. Matching is a difficult process and sometimes it is unclear whether there is a match or not. It is not an automatic process, rather it requires judgment and discretion. (For example, is a household headed by R. Smith the same as one headed by Bob Smythe?) Ideally, each household in the PES is matched or adequately resolved as not matched and thus missed in the census. Any case which is not resolved becomes "missing data" and, thus, whether those cases would add to or subtract from the undercount is unknown. The lower the missing data rate is, the more accurate the results are presumed to be. Three evaluation projects examined this problem.[25] In general, missing data were not found to be a serious problem;[26] however, there were two troubling findings. First, it is standard practice to impute persons into unresolved match households. The imputation rates for the two parts of the PES, called the "P" and "E" samples, were high: 1.7% and 2.1% respectively, which is equivalent to 3,900,000 and 5,025,000 individuals in the census when weighted up to the national population total estimate. These numbers are the same order of magnitude as the undercounts. Second, the percent of imputation in an evaluation stratum is highly correlated with the size of the undercount in that stratum. Thus, the strata for which there is more doubt about the quality of the adjusted data because of imputation tend to be the same strata for which an adjustment would result in large increases in the population.

Although Ericksen, Estrada, Tukey and Wolter do not find missing data or imputation to be a problem, Wachter

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[25]See executive summaries of P1, P2, and P3 in appendix 2.

[26]Estrada, pages 11-13.

raises some basic questions about imputation.[27] The imputation scheme used for the PES is based on a series of assumptions that are mostly guesswork.

Given the assumptions, Wachter finds that this work is of high quality, yet he is hesitant to believe that these assumptions are necessarily valid. To get some idea of whether the assumptions are important he calculates strict upper and lower bounds on the effects of imputation.[28] This analysis shows that if the imputation assumptions were incorrect, the variation in the estimates could be well beyond that expected from sampling error alone. Thus these untested assumptions are critical. They may in fact be correct, but if they are not, the adjusted estimates may be significantly in error. This implies that the estimates in the adjusted counts are subject to more potential error than has been computed.[29]

Matching error. Highly accurate matching is important because matching errors in even a small percentage of cases can significantly affect undercount

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[27]Wachter, pages 21-22.

[28]Wachter, page 22.

[29]In a letter submitted on July 11, 1991, Ericksen and Tukey dispute Wachter's concerns over imputation. Professor Wachter was offered an opportunity to respond in the interest of fair play. In his rebuttal letter, submitted on July 12, 1991, Wachter stands by his statements. Both letters are contained in Appendix 16. Wachter correctly notes that his claim was only that "a great deal rests on the correctness of the assumptions in the imputation," not that his alternatives were more reasonable than the ones used.

estimates.[30] Ericksen, Estrada, Tukey and Wolter find the matching process to be of high quality.[31] Although Wachter does not dispute that this is what the studies show, he believes that the estimate for the matching error is too low, because the rematch study "does not, by its nature, expose certain inevitable kinds of matching errors."[32] For example, he notes that the structured nature of the PES interviews could lead to inaccurate and inflated estimates for undercount rates. His evidence, though anecdotal, is suggestive of the fact that the variance due to matching error is conservatively estimated in the total error model.

Erroneous Enumerations in the Census. Erroneous enumerations include people who died before or were born after census day, fictitious people and pets listed as members of a household, twice counted people as well as people enumerated outside the PES matching area. There were a large number of erroneous enumerations in this census and they were differentially distributed. "While the national rate of erroneous enumerations was estimated at 5.4 percent, the rate for Blacks, Hispanics and central city Asians was 7.7 percent compared to 4.4 percent for all others. Minorities in central cities had the highest erroneous enumeration rate at 8.4 percent."[33] The Census Bureau studies indicate that the PES was good at detecting erroneous enumerations, although three processing offices show statistically significant

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[30]Comments by Barbara Bailar. Journal of American Statistical Association. (March 19, 1985). Pages 109-111.

[31]Ericksen, page 13.

[32]Wachter, page 20.

[33]Ericksen, et al., page 8.

underestimates of erroneous enumerations.[34] The national effect of these errors is small, but the impact on regional totals is unknown.

Ericksen, Estrada, Tukey, and Wolter take the large number of erroneous enumerations as an indictment of the census.[35] Although it is certainly a matter of concern, especially for future census planning, the relevant question is whether the large numbers of erroneous enumerations would affect the accuracy of the proposed adjustment. Wachter considers this question at length.[36]

Erroneous enumerations and cases with insufficient information are not part of the usual statistical framework for dual-system estimation. Their modeling has received much less attention than the omission rates . . . The PES, however, turns out to show that erroneous enumerations account for a large portion of the variations in net undercounts across areas and post-strata. *This outcome very much complicates the task of understanding and assessing the adjustment process.*[37] [emphasis in the original]

The adjustment factor for a post-stratum is determined by the netting out of two kinds of errors in the census--in technical terms, gross omissions minus erroneous enumerations. One would hope that the predominant

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[34]Estrada, pages 16-17; and the executive summaries of the evaluation studies P9 and P9a in Appendix 2.

[35]Ericksen, et al., pages 7-9.

[36]Wachter, pages 12-14.

[37]Wachter, page 11.

determinant of the adjustment would be the number of people missed in the census: areas with high miss rates get high adjustments. What Wachter demonstrates is that the erroneous enumerations--the number of extra people counted--are what is really driving the adjustment: areas with low duplication rates get high adjustments. For example, the three regions with the highest omission rates have very different adjustment rates. Like Wachter, I find it disturbing that "erroneous enumerations account for a large portion of the variations in net undercounts across areas and post-strata."[38]

As Wachter notes, Ericksen, Estrada, Tukey, and Wolter take the high levels of erroneous enumerations as evidence that coverage improvement programs were not finding real people but just adding fictional people to the count.[39] Wachter finds very mixed evidence on this question in comparing the counts in Detroit and Chicago. Late in the census enumeration, Detroit mounted an intense campaign to improve coverage, exceeding that mounted in Chicago. In the aggregate, Detroit did have a slightly higher erroneous enumeration rate, but a much lower omission rate. Thus, coverage improvement may very well have worked. However, for some categories of people, omission rates are roughly the same between the two cities, whereas erroneous enumeration rates are not. Thus, the evidence about coverage improvement is certainly more mixed than Ericksen, Estrada, Tukey and Wolter claim.[40] It is worth noting that Detroit

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[38]Wachter, page 11.

[39]Ericksen, et al., pages 5-9 and Wachter page 12.

[40]Wachter, pages 12-13.

and Chicago are lumped together when adjustment factors are calculated, despite their sizable differences in coverage patterns.

Correlation Bias. To the extent that the PES misses the same people that the census misses it will underestimate the undercount. The technical term for this problem is correlation bias. There are several ways of assessing the extent of this problem, but the basic message given by all of them is the same. There is strong correlation bias in the PES, especially among black males.[41] Ericksen, Estrada, Tukey and Wolter tend to dismiss this problem by noting that the presence of correlation bias results in an underestimate of the undercount, so an adjustment at least goes part way toward solving the problem.[42]

However, the presence of large correlation bias poses a fundamental difficulty for the adjustment procedure. Since there is no way to observe these people directly, the adjustment estimator attempts to include an estimate of these people. They are often referred to as the "4th cell" since they appear in the 4th cell of a 2 by 2 table in which persons in a particular post-stratum are classified as being in or not in the census and in or not in the PES. Unfortunately we have no direct data to verify if the assumptions for estimating the 4th cell are met. One piece of data indicates there may be a problem we do not fully understand. Traditional wisdom has it that males are generally more subject to correlation bias, since past data support the observation that males are more likely to be missed in both

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[41]See the discussion above.

[42]For example, see Estrada, page 14.

the census and the PES.[43] But, in 1990, about one-half of the people added to the estimate of the population from the 4th cell are women. Thus there is reason to doubt that the "fourth cell" numbers are correct. If that were the case the accuracy of the adjustment would be indirect.

One also expects that the number of people added to the adjusted population from the 4th cell should be small and that the estimate of the total population should be "lower than the truth." This is because no one expects that the estimate to fully reflect people missed in both the census and the PES. In past censuses, that has been the case. However, for 1990, the data are not consistent with past experience. Almost 5 million people were added to the estimate of the total population from the 4th cell, and the PES estimate of the total population exceeded the estimate from DA--a very unexpected finding.[44] Taken together, these findings indicate there may be problems in the adjusted count estimates that are not fully understood.

Wachter devotes several pages to the issue of correlation bias or as he calls it "catchability error."[45] His technical worry is that the allocation of this error to the model that measures the total error in the PES is done in an arbitrary fashion. Specifically, the national totals for black and for non-black males in six age groups estimated from

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[43]See the discussion of hard to count groups in C.E. Citro and M. L. Cohen, eds., The Bicentennial Census, National Academy Press, 1985, Chapter 5, especially pages 177-186, and pages 224-237.

[44]See also the earlier discussion regarding the differences between DA and the PES at the national level.

[45]Wachter, page 18.

DA are divided by the corresponding totals for females. Under the assumption of no correlation bias for females, these ratios are then multiplied by the national totals from the adjustment estimate for females in each group to give the predicted total for males. The differences between these predicted totals and the totals for men given by the calculated adjustment are the resulting national estimates of unreached persons. The method assumes all unreached people are men. This allocation, which critically affects conclusions about the accuracy of the census, is not based on empirical evidence on the distribution of those persons not reached by either the census or the PES, but rather on a formula of convenience. There is no unique way of choosing an allocation scheme. The one chosen is not obviously bad, but whether it is good is speculative and has no basis in fact. Furthermore, the variation in the PES estimates contributed by correlation bias is computed for sex ratios in an "ingenious" but ultimately untenable fashion.[46] It uses the capture probability of those reachable by the PES and census to infer a capture probability for people who intend to evade both the census and the PES.[47]

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[46]Wachter, pages 18-19.

[47]In their letter submitted on July 11, 1991, Ericksen and Tukey dispute Wachter's concerns over the consistency of DA and the PES. In his rebuttal letter, submitted on July 12, 1991, Wachter stands by his statements. Both letters are contained in Appendix 16. It is difficult to referee this dispute at the eleventh hour, especially since the lateness of the Ericksen/Tukey letter gave little chance for Wachter to prepare a detailed response. It seems however, that even given the recognized inability of the PES to reach certain black males, a PES-based adjustment would have more persons than demographic analysis would indicate. Now suppose, in fact, that one were to use the behavior of those captured by the PES to extrapolate to those missed by both surveys, as Ericksen and Tukey suggest. The estimate of the population would be, at least by

Wachter's argument over this technical point takes him back to a more fundamental point raised earlier, and also raised by Special Advisory Panel Members Kruskal and McGehee.[48] The PES is based on a statistical technique called "capture-recapture" which is often applied to estimating wildlife, particularly the number of fish in a pond. Fish are caught, tagged, thrown back and some are recaught in a second catch. An estimate of the population of fish can be made from the number of fish who are tagged on the second catch. The analogy made for the adjustment mechanism is that the census is the first catch and the PES the second. The analogy is not close, and it is not routine to adapt the wildlife model to counting the population.[49] The

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Wachter's estimate, yet another half-a-million higher. Then the PES would exceed DA by well over a million people.

Ericksen and Tukey also take Wachter to task for asserting that "[t]here is no evidence we know of that indicates that a substantial proportion of those persons counted neither by the PES nor the census avoided being counted." Ericksen and Tukey have apparently overlooked a well known study by Valentine and Valentine that concludes "one cannot [always] expect traditional interview or self-enumeration procedures to identify individuals of the type missed in the study area. * * * [T]he men were not reported because identification * * * could be detrimental to the economic welfare of the household." Citro and Cohen, *op cit.* pages 236-37.

[48]See Appendix 3: Kruskal, William, "Recommendation to the Secretary on the Issue of Adjusting the 1990 Census," Member, Special Advisory Panel, June 13, 1991, [hereafter Kruskal], page 2; Wachter pages 18-20; and also Appendix 3, McGehee, J. Michael, "Report to Secretary Robert A. Mosbacher on the Issue of Adjusting the 1990 Census," Member, Special Advisory Panel, June 21, 1991, [hereafter McGehee], pages 8-12.

[49]Citro and Cohen, *op cit.*, page 147, make this point clearly.

problem that worries both Wachter and Kruskal is that, using the fishing analogy, some fish are harder to net than others.[50] There are, among fish, some "wily trout" which cannot be caught at all. Similarly some persons are harder to count than others, and some impossible.[51] For a variety of reasons they avoid the census and other forms of registration. The conclusions drawn about the population depend on what assumptions are made about these unreachable people. Different assumptions lead to widely differing results.

McGehee's concern about the application of capture-recapture is related to this notion of countability. The census and enumeration are both done by enumerators of varying skills, in different kinds of geographical areas (urban, rural, inner city, suburb) in an attempt to enumerate people who have different incentives to cooperate with the census or the PES. Thus there is inherent in the process a large variation in the probability of a particular person being enumerated in a particular place by a particular census worker. Further, to see if a person was counted both in the census and the PES a match has to be made--we do not tag people like we tag trout.[52] The ability of the matcher thus comes into play here. McGehee recognizes that there are elaborate mechanisms in place to control for all the potential variation, but many of those mechanisms depend on unverified statistical assumptions about what is important,

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[50]Kruskal, page 3; and Wachter, page 18.

[51]See Citro and Cohen, *op cit.*, pages 139-142.

[52]Although often trout lose their tags which poses a similar conceptual problem.

and are changed after the data are in or after new research is completed.[53]

Total Error Model. An effort was made to produce estimates of expected error in the PES and variability of the estimates derived from the PES in project P16. This is generally referred to as the *total error model* since it was an attempt to combine the errors found in the PES by the other evaluation studies. These estimates of error cannot be made for any detailed groups. Instead, the population is divided into thirteen very broad categories called evaluation strata.[54] The estimates of errors for each evaluation strata are meant to be indicative of the uncertainties due to sampling error and all known components of non-sampling error. Whether the results of this study of large groups holds for smaller groups such as post-strata, states, cities or districts is unclear.[55]

This evaluation technique represents pioneering work on the part of the Census Bureau. It has been refined several times since the beginning of June, and every indication is that more refinements will be made as research on it is completed over the next several months. Nonetheless, some conclusions can be drawn from this project. On the one hand, the errors introduced by measured flaws in the PES process seem small. On the other hand, the model does show that the PES is biased toward

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[53]McGehee, pages 8-12.

[54]A list of evaluation strata and their component post-strata are included in the Decennial Census Procedural Documentation, below.

[55]Wachter, page 16.

overestimating the undercount and that a bias-corrected estimate of the undercount would be about 1.4 percent rather than the production estimate of 2.1 percent. This means about a third of the net undercount adjustment in the DSE comes from bias in the PES.

Furthermore, the undercounts tend to be higher in the minority evaluation strata, as are the biases in the PES. Even after bias correction, the minority evaluation strata show statistically significant undercounts. Ericksen, Estrada, Tukey, and Wolter note that the shift in shares of each evaluation post-strata would be small if the production estimate were corrected for bias.[56] Wachter[57] expresses various concerns about the computation of the total error model and its components as does the minority of the Undercount Steering Committee.[58] The results of this model are used further in assessing the quality of the counts themselves.

The Quality of the Adjusted Counts

The fact that the PES was generally a high quality survey does not necessarily imply that it results in high quality adjusted counts. To the contrary, erroneous enumerations and correlation bias lead to the conclusion that there are serious doubts about the quality of the adjusted population estimates.

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[56]Ericksen, *et al.*, page 15.

[57]Wachter, page 17.

[58]Undercount Steering Committee, page 6.

To understand the statistical issues involved in assessing the quality of the adjusted counts it is necessary to begin with a summary understanding of three measures of the population that the Census Bureau compared.[59] First there is the census enumeration. Second there are the adjusted counts or the production dual-system estimates (production DSE). Third there is an alternative DSE that corrects for biases found in the production DSE by examination of the evaluation of the PES in the P-studies. The third measure is used to judge the relative accuracy of the census and the production DSE. There are two main elements of concern: (1) whether to test the accuracy of population totals or of population distributions and (2) how such tests should be performed.

Should population totals or population distributions be compared? Acceptance of the PES measure of the national undercount as reasonable is only a necessary--not a sufficient--condition for it to be an adequate instrument to be used to adjust the actual enumerations. There has always been an undercount in the census. The central questions for the Constitutional and statutory purposes of the census are whether the undercount is evenly or differentially distributed across geographical areas and jurisdictions, and whether we know how to reduce the range of any differential undercounts. Indeed Congress has recognized this problem as well.[60]

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[59]These measures will be explained more fully in the course of this discussion. The alternative DSE is also called the "target" population in Census Bureau documents.

[60]Subcommittee Chairman Thomas Sawyer, for example, noted that "If the undercount were evenly distributed geographically and demographically across the population, it probably would not pose the

These questions have not been squarely faced. For the most part, Census Bureau analysts concentrated on whether we know enough to reduce the errors in the numeric counts without regard to whether this increases or decreases the severity of differential undercounts across geographical areas or jurisdictions. That is, they interpreted accuracy as concerned with getting the number of people closer to the truth rather than getting the allocation of the population for the purposes of political representation and funding closer to the truth. The two do not necessarily go together.

An illustration of the problem with using the absolute criterion alone is useful. Suppose you observed an enumeration which missed exactly 5 percent of the people in each and every block. Thus, although 5 percent is missed in each and every block, the proportion of the total population in each block is still estimated correctly. Suppose now that you adjusted this enumeration by increasing the counts in half the blocks by 1 percent and increasing the counts in the other half by 5 percent. On average you would have reduced the undercount of the population by 3 percentage points thus, improving the numeric accuracy of the nationwide total. The numeric accuracy of the absolute level of the count also would have improved for each block. However, the block proportions would now be wrong. Half the blocks would be 2 percent too small and half would be 2 percent too large relative to the average undercount. The absolute criterion would prefer this type of adjustment even

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problem that we confront here and the difficulty that we face in asking the Secretary to come to this decision." Hearing before the Subcommittee on Census and Population of the Committee on Post Office and Civil Service, U.S. House of Representatives, January 30, 1990. Serial no. 101-43. page 18.

though it moves from a situation in which every citizen gets his or her fair share of representation and funding to one in which every citizen got 2 percent too little or 2 percent too much.[61]

It is quite possible this kind of error could occur when the PES misses persons. The PES failure to include large numbers of black males in the adjusted counts could have caused just this kind of error. We simply do not know if it did.

I conclude that the Constitutional and legal purposes for the census must take precedence, and accuracy should be defined predominately in terms of getting the proportional distribution of the population right among geographical and political units. This argues for putting aside the judgment of accuracy based on getting absolute numbers right (numeric accuracy) and instead focusing on the question of whether there is convincing evidence that the accuracy of the population distribution in the adjusted numbers (distributive accuracy) is superior to the distributive accuracy of the actual enumeration. The quality of the adjusted counts themselves must be examined to address this important issue squarely.

What is the criterion for accuracy? Guideline One mandates that the census enumeration "shall be considered

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[61]Kruskal gives a similar example on page 7 of his recommendation. See also Citro and Cohen, *op cit.*, page 318. "While synthetic estimation is suggested for adjustment, because of its arithmetic and computational simplicity, synthetic estimation is not necessarily an improvement over the census count." Cohen and Citro use a numerical example as an illustration.

the most accurate count of the population of the United States, at the national, State, and local level, unless an adjustment is shown to be more accurate." This guideline requires a series of statistical hypothesis tests at various levels of geography in which the adjusted counts are to be presumed less accurate measures of the population than the actual census enumeration unless there is convincing evidence that the adjusted counts are closer to the true counts than the actual enumeration.

The true population counts cannot be observed. However, classical statistics provides a standard way of approaching the required inference. In accordance with Guideline One, we take as a working (null) hypothesis that the actual enumerations in fact better characterize the true population. The adjusted counts are an alternative measure and the question is whether the available evidence permits us to reject the hypothesis that the census better describes the true population.

We shall see below that the Census Bureau has provided substantial (although not necessarily "convincing") evidence that the adjusted counts are more accurate if accuracy is interpreted to mean numeric accuracy. However, the evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration. Thus, since accuracy is interpreted in terms of the fairness of the implied distribution of representation and funds, the Census Bureau report supports the conclusion that the adjusted counts are not more accurate.

The choice of accuracy criterion is crucial because there appears to be a substantial national net undercount in the numeric census counts. Simply correcting for the

estimated net undercount can improve numeric accuracy but significantly worsen distributive accuracy. We can see that we missed people in most areas, but we lack a tool which can improve the distribution of population for the purposes of political representation and funding.

How are the tests of accuracy performed?

(a) The Census Bureau Loss Functions

The Census Bureau approach to testing the quality of the adjusted counts relies heavily on showing that the PES was well-executed and that the identified biases in the production Dual System Estimates or adjusted counts (DSE) are small relative to an "ideal" DSE. Unfortunately this type of validation methodology does not work in the present instance because of a basic design flaw: The DSE fits broadly into the class of "certainty-equivalent" predictors which use estimates as if they were known for certain rather than subject to statistical variation. A statistically optimal estimate of the population for an area would take account of this uncertainty.[62] Thus the conclusion that the measured

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[62]The optimal estimate would average the ideal DSE estimate (based on the correct model and perfect data) with the actual enumeration with more weight being put on the actual enumeration when the model parameters are less precisely estimated. In point of fact, there are statistical theorems which demonstrate that even if the correct statistical model were known and perfect data were used, the Dual System Estimator (DSE) could generate adjusted counts which are either (1) clearly less accurate, or (2) not significantly more nor less accurate, or (3) clearly more accurate measures of the true population than the actual enumeration from the census. The question is which of these occurred? A textbook analysis of the suboptimality of the certainty equivalent approach is found in Arnold Zellner, An Introduction to Bayesian

shortcomings of the adjusted counts under consideration (the "production DSE") are small relative to the ideal DSE merely means that the production DSE has a chance of improving accuracy. It is unacceptable to go the next step and conclude that a good production DSE would be more accurate than the actual enumeration.

The production DSE are in fact less accurate than those ideal DSE because (a) the data were less than perfect, and (b) the correct model was not known. The bulk of the Census Bureau effort was aimed at seeing whether these data and modelling problems were disqualifying for the production DSE. It is clear that the production DSE are not unbiased estimates of the differential undercount rates and the DSE procedure overcorrects for the measured undercounts. This is measured in the total error model discussed above. These biases are quantified for thirteen large evaluation strata.

Using the total error quantification, the Census Bureau has generated an alternative Dual System Estimator of the population. It is worth noting here, that the errors in the production DSE are quantified for 13 very large groups of people. These errors are then "parcelled out" to the 1392 post-strata used to calculate an adjustment, the adjustment factors are corrected for these biases, and the alternative DSE is calculated. Since there are also estimates of variance

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Inference in Econometrics, New York: John Wiley & Sons, 1917, pages 322-327. Intuitively, the problem arises because a full correction is attempted which is optimal only if one knows exactly the undercount or overcount in each area. As the actual uncertainty increases about exactly where and how many people were missed, attempts to make the full estimated correction increase the error variance relative to optimal and eventually, if uncertainty is large, relative to the unadjusted counts.

for the DSE, the Bureau actually calculates a statistical distribution of possible alternative DSE. A thousand random draws from this alternative distribution were used to generate estimates which the Census documentation terms "the target population." This is not the true population distribution--which is unobservable--but rather a tool for assessing the quality of production DSE counts relative to an "ideal" DSE based on more perfectly measured data and more correct models. But this hypothetical DSE is also just an estimator--subject to statistical error. So a correct analysis must account for two errors: (1) the error that comes from using the production DSE rather than the idealized DSE and (2) the error that is inherent in the idealized DSE. Then that combined error should be compared with the error in the actual enumeration.

To make matters even more complicated, legislative--and, now, judicial--representation must be apportioned and allocated over many levels of government into districts that treat their residents as fairly as practicable. Thus, comparisons must be made not only at the various levels of government on which funding is based, but down to the census blocks which are the basis for drawing district lines for Federal, State, and local elections. Unfortunately, the Census Bureau did not have the time to conduct the hypothesis tests required by Guideline One before the Undercount Steering Committee report was completed on June 21, 1991. The method they used instead to make these comparisons is called loss function analysis.

In brief, loss function analysis is used to compare two sets of counts for the same population. Ideally, one of the sets of counts is the true population, and thus the loss in accuracy from using the alternative set of counts is

measured. In practice, however, the truth is not known, so care must be taken in the interpretation of results. A loss function analysis can be performed at any level of geography--states, counties, cities, precincts, or blocks.

As an example, suppose a loss function analysis is being calculated for states. The difference between the two estimates of the population is calculated for each state. Then some kind of average is taken of the differences across all states to get an aggregate measure of total loss. The differences may be squared, summed and the total divided by the number of states. Alternatively, the absolute values of the differences may be averaged, where the average is weighted by the size of the state. There are an infinite number of formulas that can be used to average the state-by-state losses to get a single measure of total loss. These formulas are called "loss functions," and the results of any analysis can depend heavily on which loss function is chosen. For example, the loss function that uses squared differences penalizes a few large errors much more heavily than many small errors. The absolute value loss function does not have this property. The choice of a loss function is not scientific. It is usually made on the basis of convenience or tradition.

One more general comment on loss function analysis is needed. The loss function is ideally suited to measuring loss when an estimator of a population count is being compared to a known true count. In this case, the interpretation of the loss is straightforward. It is the accuracy lost by using the estimator. However, when one imperfect estimator is being compared to another, it is more difficult to interpret the loss of one estimate. The temptation is to call one estimator the "truth" and measure loss against

it. But one is not measuring loss against the truth. This is simply measuring loss of one estimate against another. There is no reason to think this analysis tells you anything about the truth. In loss function analysis, it is critical to consider the base being used for comparison--losses are measured only relative to that base.

The loss function analysis run by the Census Bureau asked whether the enumeration or the production DSE was closer to the "ideal" DSE.[63] This does not form a statistical test of whether the production DSE are more or less accurate than the census counts. It only calculates which set of numbers on average is closer to another set of estimates (the target population). These tests were simply not proper statistical tests to address the critical hypothesis about the distributive accuracy of the PES and the census enumeration.

Their examination of this closeness question erred further in two significant ways: (1) Instead of comparing the production DSE that would be used, they compared the mean of 1000 draws from a model reflecting the statistical properties of the DSE. This effectively eliminates the inaccuracies derived from using one particular set of adjustments. (2) Rather than using Guideline One's mandate that the actual enumeration be deemed more accurate unless the adjusted counts are shown convincingly to be more accurate, the Census Bureau did the reverse--they preferred adjusted counts if the actual enumeration was not proven

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[63]This loss function analysis is described in detail in Undercount Steering Committee, pages 6-7; and Bryant, pages 12-14.

more accurate.[64] Thus the Census Bureau loss function analysis was seriously deficient.

There is, nonetheless, a June 27, 1991, Addendum to the Undercount Steering Committee report of June 21, 1991, that corrects some initial flaws in the loss function analysis.[65] This addendum attempts to correct for the error in failing to allow for the fact that the target population was itself an estimator subject to random variance. An allowance for this variance was removed from the variance charged to the census counts and estimates made of the number of states for which the population proportion would be made less accurate was generated. The number of state proportions worsened depends crucially upon the allowance made for variance in the alternative DSE: If only the variance measured in the total error model is used, then the shares of an estimated 21 states are made worse by adjustment (using an absolute value loss function).[66] However, this is clearly a minimum

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[64]This last error may reflect the fact that the Census Bureau ignored the difference between the true population and its own approximate ideal estimator. See for example, the Undercount Steering Committee, page 2: "Time did not allow for full simulations of accuracy for smaller areas. There was some evidence from the loss function analysis, but there was no independent evidence with which to compare it. . . . Even so, in the absence of direct evidence to the contrary, the majority concludes that adjusted counts are generally more accurate at lower levels."

[65]A discussion of how this change affected the Undercount Steering Committee's conclusions is contained in the discussion of Guideline Six, below.

[66]See Appendix 5. Addendum to the Undercount Steering Committee Report, July, 1991. [hereafter Addendum], page 3. Given the original erroneous analysis, the Undercount Steering Committee report (page 6) was formulated when the committee thought the accuracy of only about

estimate. "As a matter of judgment, the total understatement of variance of the estimates from the smoothing model may be in the range of a factor of 1.7 to 3.0 in terms of variance," according to the Undercount Steering Committee.[67] Allowing for a variance factor of 2.0, which is near the lower end of the Undercount Steering Committee range, the proportional shares of about 28 or 29 states would be worsened by an adjustment in terms of distributive accuracy.[68]

Even with the variance factor set at only 1.0, adjustment is estimated to have worsened distributive accuracy compared to the census counts in 11 of the 23 metropolitan areas in cities with 500,000 or more persons: Phoenix, Washington, DC, Jacksonville, Chicago, Baltimore, New York City, Memphis, Dallas, El Paso, Houston, and San Antonio. Again using only the measured variance, half of the 14 metro areas in counties with over 500,000 persons are made less accurate proportionally by adjustment. Only aggregate measures are available for areas of other sizes. These show that on average the adjusted figures improve distributive accuracy relative to the census, but no detail is given as to the number of jurisdictions for which the PES is closer than the census. In all these sub-state cases, too, the estimated distributive accuracy of the adjusted figures deteriorates dramatically compared to the

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11 states was worsened by adjustment.

[67]Undercount Steering Committee, page 5. The actual variance is believed to substantially exceed the measured variance because of doubts similar to those raised by Wachter for the matching and imputation procedures.

[68]Addendum, page 4.

census if the variance is increased to allow for the unmeasured uncertainty in the estimator.

In sum, the corrected Census Bureau estimates of distributive accuracy marginally favor the adjusted counts--though many states and communities would be less accurate--*if* only the measured variance is used. When the variance is increased into the plausible range (in the professional judgment of the Undercount Steering Committee), distributive accuracy comparisons are more favorable to the census counts.

It is worth reiterating that Guideline One specifically places the burden of proof on the adjusted estimates, not on the census. The census is considered to be more accurate unless the adjusted figures are shown to be more accurate. With respect to places under 100,000 population there is no direct evidence that adjusted counts are more accurate.[69]

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[69]The Undercount Steering Committee report states "in the absence of direct evidence to the contrary, the majority concludes that adjusted counts are generally more accurate at lower levels," and later "while analysis was not available for smaller areas, the majority concludes that acceptable patterns would happen there also." (Undercount Steering Committee, page 2.). The reasoning is contrary to the explicit mandate of the guideline. Similarly the Director stated, "there is little evidence to judge whether the proportional distribution of adjusted counts is more accurate for places under 100,000. However, Loss Function Analysis shows that for metropolitan places of less than 25,000, 25,000-49,000 and 50,000 or more, and for nonmetropolitan places less than 25,000, and 25,000-49,000 in total, by these sizes categories, adjusted counts are more accurate than the census. However, there are concerns about the accuracy of the loss function assumptions for small areas." (Bryant, page 14.)

What evidence there was based its conclusions primarily on the numeric accuracy of the adjusted counts rather than the adjusted proportions, and that the Bureau depended upon indirect evidence rather than direct tests of statistical hypotheses.[70]

(b) Face validity tests

In addition to Loss Function Analysis computed by statisticians, demographers at the Census Bureau made an independent evaluation of the adjusted population counts for states. To do this they compared the adjusted state counts with counts simulated by DA. To make the simulations (because DA provides data only at the national level), they disaggregated census counts for each state by race and Hispanic ethnicity. They then applied DA national undercount rates to black and non-black subpopulations and PES rates to Hispanic and Asian and Pacific Islanders. Then they built up new state estimates by recombining the racial and ethnic groups. These simulated state estimates further confirmed the "face validity," or reasonableness, of the

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[70]In a June 28, 1991, memorandum Senior Mathematical Statistician Robert Fay reports his efforts at conducting formal hypothesis tests of the distributive accuracy of the adjusted figures at the state level only. There was not time for the Undercount Steering Committee to review this memorandum and it may contain further errors. Nonetheless, although the hypothesis tests rejected the superior distributive accuracy of the census counts if only the measured variance was changed to the adjusted figures, the superior accuracy of the census counts was easily accepted for a variance factor of 2.0 and appears (by interpolation) acceptable at any variance factor in the Undercount Steering Committee's plausible range of 1.7 to 3.0.

adjusted state counts.[71] These face validity tests depend critically on what the analyst expects. Face validity tests certainly cannot be a substitute for formal tests, but just as face validity can be used to show that adjustment is making counts more accurate, face validity can show the opposite.

For example, is it reasonable that New Mexico has the highest undercount rate of any state? Why should the undercount rate for Montana be higher than that of New York State? How can the very low estimated undercount rates in cities like Philadelphia be explained? Of the large cities, only Washington, DC and Boston showed increases in their black populations between 1980 and 1990. Yet, Washington DC is estimated to have a very large undercount rate and Boston is estimated to have a very small undercount rate. Why are the only estimated overcounts for cities over 100,000 concentrated in New England? Why should Akron and Dayton have high estimated undercount rates (3.0% and 3.3%, respectively) and Cleveland have such a low estimated undercount rate (1.4%)? These examples illustrate as above the point noted above that was raised by Wachter earlier--there is much more texture to the pattern of undercount that lies well beneath the surface of any aggregate loss function analysis. Face validity cuts both ways. And the face validity of the proportions of persons in states and localities has not even been checked.

(c) Ericksen, Estrada, Tukey, and Wolter's claims regarding accuracy

These panelists take a different approach to the problem of accuracy of the counts at state and local levels.

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[71]Bryant, page 14.

An article by Wolter and Causey attached to their jointly authored document[72] argues that accuracy improves, on average, at lower levels, so long as the measured undercounts at aggregate levels tend to have smaller errors than the original enumeration. In addition it is argued in a similar manner in an attachment to the joint report that Ericksen, Estrada, Tukey and Wolter submitted that adjusted counts will on average improve block level data (and thus data for localities) consistent with its improvement of data at larger units of geography.[73] Thus their argument asserts that by applying the total error model to the 13 evaluation post-strata, the PES is shown to be more accurate than the census and the error in the PES is shown to be low. They conclude, based on the theoretical argument by Tukey and the empirical argument made by Wolter and Causey, that

a. The total combined error increases as the size of the group decreases; *e.g.*, the combined errors for 5 million blocks will be larger than the combined errors for 1392 post-strata.

b. Consequently, the improvement in amount due to adjustment will be nearly the same for larger and smaller groups, the improvement in percentage terms decreases, but does not change sign, as the groups become smaller.[74]

Ericksen, Estrada, Tukey, and Wolter note that these conclusions depend on a particular measure of combined

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[72]See appendix G of Ericksen, *et al.*

[73]See appendix F of Ericksen, *et al.*

[74]Ericksen, *et al.*, page 20.

error--a loss function that uses a size-weighted sum of relative error. Their primary point is that, with such an error measure, conclusions about local accuracy can in fact be drawn from accuracy conclusions at larger levels. In short, they contend, "improvement in quite large areas thus prophesies improvement in very small areas, as well as a variety of intermediate levels." They see a post-enumeration survey with small measured error (and some, like Wachter and the Undercount Steering Committee contend that such error is very conservatively measured) for thirteen large evaluation strata. They conclude that the adjusted counts for these large evaluation strata are more accurate--a questionable inference because they made no formal statistical test of this hypothesis. From this questionable conclusion they apply mathematical theory to infer *average* accuracy improvements at lower levels.

In testimony before Congress, an official of the General Accounting Office raises some questions on the issue of sampling error and lower level geographic accuracy:

We believe the amount of sampling error, or variability, deserves attention by the Secretary because it was a consistently high source of uncertainty in the PES over-and undercount estimates. The PES estimates are based on samples and therefore subject to random error. The levels of sampling variation measured by the evaluations of the PES were generally much higher than anticipated by the original design of the PES. For example, even after smoothing to reduce sampling variability, PES over- and undercount estimates for 4 of the 13 evaluation groups did not show a statistically significant difference from the census count. In other words, due to the variability resulting from doing a sample, *the Secretary cannot be sure whether 4 of*

the 13 population groups reviewed in the Bureau's evaluation of total error in the PES were overcounted by the census, undercounted, or if the census count was correct. (emphasis added)

The need for precision is especially important because the Bureau's procedure for carrying down PES adjustment factors to lower geographic levels applies the same adjustment factors to large numbers of people over wide geographic areas with similar demographic characteristics.[75]

The Wolter/Causey paper does not address this argument directly. In addition, Wachter argues cogently against indiscriminate use of the Wolter/Causey paper:

Theirs is a very interesting paper, but its relevance is limited by its concentration on highly aggregated summary measures of improvement. It does not present explicit results on how many units at various levels might be made worse and how many made better by an adjustment. Furthermore, important calculations in the paper depend on stylized assumptions about correlations in the components of the undercount which may or may not hold in fact either for previous PES-like data or for the 1990 PES. These prior studies are valuable, but they are no substitute for examination of the actual 1990 data.[76]

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[75]See appendix 17. General Accounting Office. "1990 Census: Applying PES Results and Evaluations to the Adjustment Decision." Testimony before the Subcommittee on Census and Population, Committee on Post Office and Civil Service House of Representatives. [hereafter GAO Report]. Pages 7-8.

[76]Wachter, page 27.

There are fundamental difficulties with the Wolter/Causey argument. I am not convinced that at the evaluation strata level we can conclude the PES is more accurate. First, the measured bias alone is one-third of the total undercount and the Undercount Steering Committee itself stated that there are other non-measured sources of error.[77] Wachter also raises several fundamental concerns about this measurement. Second, the analysis depends on a particular loss function that weights a few large relative errors more than many small ones. This is not inherently bad, just arbitrary.[78] Wachter perhaps summarizes it best:

I do not believe that any highly aggregated index or loss function is appropriate for summing up overall accurary. It is informative to understand how much the outcomes of calculations with different versions of such aggregated indices differ. But the choice among them is not a scientific choice. Each such index involves implicit value judgments about different sorts of error. For example, each index determines whether a few large errors are more serious that a great many smaller errors. *Whether we agree with a particular tradeoff is a matter of personal and political values. It should not be disguised as science.*[79] [emphasis in original]

Loss functions mask the incredible complexity of the adjustment operation behind a single number. To get a

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[77]Undercount Steering Committee, page 5.

[78]Indeed, Ericksen, Estrada, Tukey, and Wolter make no claim of uniqueness for their choice of loss function. As noted earlier, the choice of loss function can control the results of an evaluation.

[79]Wachter, page 5.

glimpse of this complexity, it is useful to look at the undercount rates by state. Table 1 and Figure 2 of Appendix 10 show the undercount rate by state with margins of error. Counting the District of Columbia as a state, 42 of the 51 states show an undercount rate that is statistically significant. More importantly, however, is how these undercount rates differ from the national average, since it is these differences that determine which states win and which lose. Table 6 and Figure 1 of Appendix 10 show these differences again with margins of error. Only 18 of the 51 states have an undercount rate that is significantly different from the national average. That means in 33 states we do not know if the undercount rate is higher, lower or the same as the national average. Put another way, we do not know if these 33 states deserve more or less political representation and Federal funding than they are receiving. We do not know for these 33 states if an adjustment would result in a more equitable distribution of political representation and resources.

There are winners and losers from an adjustment--that is to be expected whenever a fixed set of resources is going to be divided. More seriously, however, there is general agreement that there will be some localities' counts that will be made less accurate by an adjustment. The proponents contend that, on average, more areas are made accurate, or more people live in areas whose counts are more accurate, or on average the counts are more accurate. These are all vague and general statements that do not describe the areas of the country where accuracy is likely increased and decreased, the types of towns where accuracy is likely increased and decreased, the neighborhoods where accuracy is likely increased and decreased. We have already seen above that general statements about improved accuracy on

average are little if at all justified if realistic values are used for the error variance of the alternative DSE. Furthermore, the rhetoric, if not always the analysis, is centered around absolute levels of the counts, not improvements in the distribution of the counts.

Conclusions

Guideline One requires that convincing evidence be offered that the adjusted estimates of the population are more accurate than the census at the national, State, and local levels. In the absence of such evidence, the census counts are concluded to be the most accurate.

At the national level, it is likely that the PES-adjusted estimates reflect more accurately the total population and the racial and ethnic populations of the country. It appears equally clear, however, that the PES omitted large numbers of certain groups--notably black males. We have no information on the location of these persons. In addition, the PES and demographic analysis lead to sharply different conclusions about the accuracy of the census for several age/sex groups at the national level. Although these are not definitive disqualifiers at the national level, they do raise some question as to whether the adjusted figures are more accurate than the census count even at the national level.

The Constitution requires a census every 10 years not just to count the total number of people in the United States but to locate them so that political representation can be allocated to the states and the people in them in proportion to their numbers. I conclude that the primary criterion for accuracy should be distributive accuracy--that is, getting most nearly correct the proportions of people in different

areas. Improved numeric accuracy, although in itself desirable, cannot compensate for treating states and individuals less fairly.

At the State and local level the correct statistical analysis for both distributive and numeric accuracy simply has not been completed. The total error model indicates that the adjusted figures tend to be too high but generally closer in numeric terms to the true population than the census counts which tend to be too low. However, there is sufficient uncertainty about the true variance of the adjusted figures that even numeric accuracy has not been definitively demonstrated. The loss function analysis and hypothesis tests that have been prepared by the Census Bureau to date, although of uncertain reliability, do support the superior accuracy of the census counts versus the adjusted figures when we consider distributive accuracy--or fairness--and use reasonable estimates of the error variance of the alternative DSE. That is, for the Constitutional purposes of the census the available evidence is consistent with the census counts being more accurate than the adjusted counts. There is certainly not sufficient evidence to reject the distributive accuracy of the census counts in favor of the adjusted counts.

I conclude that, in accordance with Guideline One, the census counts are the most accurate count of the population of the United States at the State and local levels. While the preponderance of the evidence leads me to believe that the total population at the national level falls between the census counts and the adjusted figures, that conclusion is not relevant to the determination of distributive accuracy. Thus this guideline weighs in favor of a decision not to adjust.

Guideline Two

The 1990 Census may be adjusted if the adjusted counts are consistent and complete across all jurisdictional levels: national, State, local and census block. The resulting counts must be of sufficient quality and level of detail to be usable for Congressional reapportionment and legislative redistricting, and for all other purposes and at all levels for which census counts are published.

Explanation

This guideline acknowledges that the population counts must be usable for all purposes for which the Census Bureau publishes data. The guideline also reinforces the fact that there can be, for the population at all geographic levels at any one point in time, only *one* set of official government population figures.

Thus, the level of detail must be adequate to produce counts for all such purposes. If the 1990 Census count is to be adjusted, it must be adjusted down to the census block level. It must be arithmetically consistent to eliminate confusion, and to prevent any efforts to choose among alternative sets of numbers to suit a particular purpose.

If the Census is to be adjusted, a process called synthetic adjustment will be used. A synthetic adjustment assumes that the probability of being missed by the census is constant for each person within an age, race, Hispanic origin, sex, and tenure category in a geographical area. A synthetic adjustment is performed in two steps. First, the preferred adjustment factors are estimated for a variety of post strata defined by age, race, Hispanic origin, sex, and

tenure within geographic areas. Then the adjusted estimate in each category for a census block is obtained by multiplying the unadjusted census estimate in that category by the adjustment factor. The adjusted census estimate for the census block is computed by adding the estimated adjustments for each post strata cell of the block. Put simply, in an adjusted population count each individual enumerated will receive a relative weight according to his or her race, age, sex, ethnic background, tenure, and place of residence. The aggregate counts will then be built up from the weighted individuals to census block, local area, state and national counts.

We will conduct evaluations of small area estimations to ensure that this process results in counts that are in fact more accurate.

Evaluations of small area estimation. Coverage error may vary substantially within the post-enumeration-survey post-strata, although the post-strata were drawn to be homogeneous with respect to expected coverage error. The goal of this analysis is to determine whether or not the assumptions underlying a synthetic adjustment of the census are valid and produce counts which are more accurate at all geographic levels at which census data are used. In particular, the within-strata block-to-block variance in characteristics and net overcounts or net undercounts will be analyzed.

Discussion

If I had determined that an adjustment should have been undertaken, the Census Bureau would have issued block-level Public Law 94-171 tapes that would have

replaced those issued in the first three months of this year. Replacement Summary Tape File (STF) data would have also been issued and all future census products would have used adjusted counts. Our ability to have done so would have satisfied the production requirements of this guideline.

The substantive question here is whether the adjusted counts are of sufficient quality to be used for all purposes for which census counts are published. Clearly the quality of the adjusted figures is intimately related to their accuracy, which, as the discussion of the preceding Guideline shows, does not compare favorably with the actual enumeration. This Guideline raises another issue--synthetic adjustment.

As explained earlier, the adjustment process uses a survey of persons in 5,290 block clusters to change the number of people in 4,830,514 blocks. Based on extrapolation from this survey 6,188,204 unidentified persons are added by duplicating records of people counted in the census, and 918,937 people who were actually counted in the census are deleted. The adjustment process is done by dividing the population of the country into 1392 groups. Each member of one of these groups is assumed to have the same probability of being missed in the census as every other member of that group. The real quality of the census in a given block or even a given city has little impact on the adjustment of the count of the population of that block or that city. As will be seen in the discussions of Guidelines Seven and Eight, most local officials think that the adjustment will fix particular problems that they have identified in the count for their towns. It would do no such thing.

A synthetic adjustment assumes that the probability of being missed by the census is constant for each person within an age, race, Hispanic origin, sex, and tenure category in a geographic area. These groupings of persons are called post-strata. A synthetic adjustment is performed in two steps. First, the preferred adjustment factors are estimated for 1392 post-strata. Then the adjusted estimate in each category for a census block is obtained by multiplying the unadjusted census count in that category by the adjustment factor. The adjusted census estimate for the census block is calculated by adding together the estimated adjustments for each post-strata represented in the block. Because of the problems of correcting a census with a survey, adjusted figures cannot be more accurate than the census counts in each of the 4,830,514 occupied blocks, or at all larger aggregations of them. There is no PES system--short of one which took a second perfect census--that could say adjusted counts are more accurate for all blocks. The question is whether the assumptions that underlie this synthetic adjustment mechanism are good enough to conclude that the counts are sufficiently accurate to be usable at a block or precinct level.

As noted above, the synthetic adjustment process rests on the assumption that persons in each post-stratum are homogeneous with respect to their probability of being missed by the census, *i.e.*, their capture probability. This is admittedly a very difficult thing to measure. There were several approaches taken by the Census Bureau to validate the homogeneity assumption, all contained in project P12.

The first part of P12 collapsed the 1392 post-strata by age and sex into 116 larger groups. To test whether the people living on blocks within these 116 larger post-strata

are homogeneous with respect to capture probability, the Census Bureau conducted an analysis of the homogeneity of 115 of the 116 larger post-strata (the 116th is persons living on Indian reservations). A regression model predicted an adjustment factor for block parts, then compared that with an adjustment factor of 1.0 (no adjustment) representing the numeric census counts. This predicted adjustment factor was also compared with the measured factor for the post-strata used in creating the adjusted counts. For 24 of the 115 post-strata the census count was superior while for 91 post-strata the adjusted count was superior in terms of numeric accuracy. The Director interprets these findings to "give support to the accuracy of the selected PES adjustment model."[80] Regrettably, this evidence does not directly address the homogeneity issue. Like the uncorrected loss function studies this simply compares the census and the PES to yet a third estimate (the regression equation) whose quality or closeness to truth is unknown. This cannot be called a test or even a verification of the homogeneity assumption. To pursue this approach, allowance should have been made for the true variance in the regression estimates in a manner analogous to that done in the Undercount Steering Committee Addendum for the target population. It must be understood that such errors can easily occur when cutting edge research is used for production purposes under extreme time pressure.

The second part of P12 analyzed the homogeneity of state parts within post strata. Techniques known as analysis of variance were used to determine the validity of using post-strata, rather than states, for estimation of adjustment factors. The study was designed to determine if there was

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[80]Bryant, page 18.

relatively more homogeneity within state or within post-strata. The study showed that, with the exception of the Mid-Atlantic Division, state differences were not significant within post-strata. This result was compatible with the conclusion that there is relative homogeneity for state parts within post-strata. There is no evidence of homogeneity for other geographic levels.[81] The only conclusion that can be drawn from this study is that the Census Bureau was better off using the actual post-strata for synthetic estimation than using any state-specific effects. Whether the levels of homogeneity within post-strata are acceptable is not even addressed.

The third part P12 looked at state homogeneity from a different vantage point. It measured whether other factors that are often correlated with undercounting are homogeneous within post-strata. Contrary to the results of the second part of the studies, these factors showed significant heterogeneity by state within post-stratum for well over 80% of the post-stratum groups. This study went further and measured the homogeneity of some of the components of the dual-system estimates at the block level and found about 14% of the post-strata groups to have significant state effects. Thus, the evidence in this study for the presence or absence of homogeneity within post-strata is mixed.

In summary, the analysis presented for decision from P12 was substantially different from that planned by the

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[81]The Undercount Steering Committee report states that a majority of the Undercount Steering Committee believe this result would hold for other geographic levels. However, there is no evidence presented to support this. Undercount Steering Committee, page 2.

Census Bureau and used only the State as a surrogate for heterogeneity. We clearly do not thoroughly understand whether or not heterogeneity is a real problem. There are indications that using post-strata for synthetic adjustment is better than using states, but nothing more. It is impossible to conclude from any information the Bureau has presented in P12 that there is not residual heterogeneity within post-strata.[82]

Project P15 approaches the homogeneity problem by attempting to measure the quality of the dual system estimates by examining their expected variability. The measure used to do this is called the coefficient of variation which is the ratio of the sample standard deviation to the sample mean. The PES was designed so that these coefficients of variation were expected to be equal to 0.7 percent for the areas used in the design. In fact, in 48 of the 54 areas examined, the actual coefficients of variation are larger than expected. They ranged from 0.45 percent to 4.4 percent. This is direct evidence of substantially more variability in the DSE than expected and indirect evidence of heterogeneity within post-strata.

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[82]Estrada agrees that the findings from P12 are mixed, although his conclusions differ from mine: "It supports the fact that PES poststrata are homogenous with respect to expected coverage error, but also questions the homogeneity of the division level poststratum. These findings lend support to the accuracy of the adjusted count based on the synthetic method particularly within poststrata and block-to-block variance in characteristics and net overcounts and undercounts. Overall, 79 percent of the time the adjusted count is better than the census count. Nonetheless, this research 'flags' the need to be aware of State effects." (Estrada, page 19.) Given the fact that reapportionment depends critically on state counts, Estrada's conclusions raise a large flag in terms of accuracy.

Other arguments have been made about this guideline. As noted in the analysis of Guideline One, Ericksen, Estrada, Tukey, and Wolter rely heavily on the Wolter/Causey/Tukey argument that synthetic adjustment will increase the accuracy of the counts.[83] For the reasons explained in the discussion of Guideline One, I do not find this argument compelling. Its reliance on the unsubstantiated homogeneity assumption simply emphasizes the concerns raised earlier.

Estrada argues that it is not necessary to show that the adjusted counts have to be better for all purposes, if it is shown on average to improve counts for its principal uses. "Improved counts to meet Constitutional needs for reapportionment and redistricting would be sufficient justification to adjust, even though for some other uses adjusted counts are less valid."[84] I do not consider this argument persuasive. Reapportionment and redistricting counts are the most demanding in terms of accuracy because block level counts are required to accomplish both.[85] If adjusted counts are better for these purposes, then they would necessarily be better for all others.

McGehee asserts that "variances between processing offices and evaluation strata fall outside expected levels in a number of the evaluation studies. At the district office level and below the data contain such wide variances that they

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[83]See Estrada, page 19; Wolter pages 7-8; and Ericksen *et al.*, pages 20-21.

[84]Estrada, page 18.

[85]Recently, Mississippi's proposed redistricting plan was overturned by the Department of Justice for failure to use block-level data.

could not be reconciled without weighting them to much higher levels."[86] As an example he notes that "the [matching] effectiveness rates varied from a low of 87.2% in Albany to a high of 93.49% in Kansas City.... [T]here was a significantly different level of success in Kansas City than in Albany. But why? The answer is that we do not really know."[87]

Special Advisory Panel Member Tarrance links the usability of adjusted counts for redistricting with the disruption the use of such counts would cause.[88] These arguments will be considered under Guideline Seven.

Wachter has serious concerns about the usability of these adjusted counts. I consider his concerns about state population totals and reapportionment under Guideline Three.[89] He does, however, present evidence that casts serious doubt on homogeneity within post-strata. Because "very little is known about local heterogeneity in census coverage,"[90] he conducted simulations on 10 selected PES block clusters to determine the effect of an adjustment on both the improvement in the numeric level of the population at the district office level and the improvements in the shares

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[86]McGehee, page 32.

[87]McGehee, page 4.

[88]See appendix 3: Tarrance, V. Lance "Report to the Secretary of Commerce," Member, Special Advisory Panel, June 14, 1991, [hereafter Tarrance], pages 17-18.

[89]Wachter, pages 24-26.

[90]Wachter, page 26.

or proportions of the population in a given district office. In other words, he considered both numeric and distributive accuracy. In Wachter's simulations, the level of the population is improved about twice as often as it is worsened by an adjustment. However, the shares suffer much more from the simulated adjustment. On average 59% of the office proportions are better, but the range over all the simulations shows anywhere between 39% to 78% improvements. Furthermore, in 7% of the simulation trials a majority of the districts are made worse. Now in any simulation, a true population for a block must also be simulated. Wachter argues that truth is chosen in his simulations so as to overestimate improvements achievable by an adjustment.

Wachter's evidence on heterogeneity is the only evidence that looks at actual behavior in the 1990 census and PES below the state level, and the only evidence that looks at the effect of heterogeneity on the shares of the population rather than the population levels. He states that his results are preliminary and need more work--but at least they are results that bear directly on the homogeneity issue. I find compelling his conclusion that "local heterogeneity is a serious problem for adjusting the 1990 census at district levels. My evidence indicates that a substantial portion, possibly a majority, of relative counts for district-size units can be made worse off by adjustment."[91]

Wachter made other efforts to measure block-to-block heterogeneity and district-to-district heterogeneity. These other attempts are inconclusive and neither support nor deny

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[91]Wachter, page 29.

the homogeneity assumption, so, therefore, I did not consider them to weigh either for or against an adjustment.[92]

Heterogeneity and local variability pose a vexing problem for synthetic adjustment as GAO noted in their testimony.[93] In his article, Freedman makes this clear:

Variability is a major obstacle to adjustment. Indeed, undercount rates differ from one geographical area to another, and from one demographic group to another. That is why synthetic estimates for small areas, based on demographic analysis, have not been widely accepted. However, adjustment by the DSE [Dual System Estimate] is unsatisfactory for the same reason. For example, one post-stratum consists of Hispanics--cross-classified by age, sex, and housing tenure--in central cities in the Pacific Division (California, Washington, Oregon, Alaska, and Hawaii). In round numbers, the 1990 population of the Pacific Division is about 40 million with 8 million Hispanics, 5 million of the latter being in southern California.

Consider an adjustment for Stockton, a city of about 200,000 people in California's Central Valley, a 4-hour drive north of Los Angeles. The Hispanic population is about 50,000; there can be at most a few dozen Hispanics from Stockton in the PES [Post-enumeration survey], and a handful of gross omissions [persons counted in the "p" sample who were not in the "e" sample (census)] or erroneous enumerations [persons counted in the "e" sample

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[92]Wachter, pages 30-32.

[93]See the quotation from GAO in Guideline One.

(census) who were not found in the "p" sample]. No stable estimates could be developed from a sample that small. Instead, estimates for Stockton would be based on the adjustment factor for the whole post-stratum, the numbers being driven by PES data from southern California. The basic assumption: undercount rates for Hispanics are the same in Stockton as in Los Angeles. *There is no empirical evidence to support this assumption.* [Emphasis added.] And there is a similar problem for non-Hispanics. Indeed, adjustment factors for non-Hispanics in Stockton are driven by PES data on non-Hispanics in the whole Pacific Division. Apparently, Stockton's non-Hispanics are supposed to be like their counterparts in the north, while its Hispanics are taken to be southern. *Stockton is the rule not the exception.* [Emphasis added.] There are 39,000 state and local government areas to adjust; and only 5,000 sample blocks with PES data. *Most jurisdictions would be adjusted on the basis of data from elsewhere* [Emphasis added.]--and the synthetic assumption.[94]

None of the evidence I was given, other than Wachter's, confronted the measurement of this problem head on. The questions that remain unanswered are fundamental: What is the extent of residual heterogeneity within post-strata down to the county, city, precinct and block level, and what is the effect of that heterogeneity on the adjusted estimates both in levels and shares? Until this is known, the statement that the counts are usable for all census purposes is no more than an assertion.

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[94]Freedman, pages 1233-1236.

Conclusions

I conclude that the considerations pointed to by Guideline Two tend to reject use of the adjusted figures and support use of the census counts. The adjusted figures--like the census counts--are consistent across all jurisdictional levels and of sufficient detail for all purposes. However, the adjusted figures do not appear to be of sufficient quality to be usable for reapportionment and redistricting. First, the distributive accuracy of the census counts is superior as concluded above in my review of the evidence on Guideline One. Furthermore, substantial evidence casts doubt on the homogeneity assumption underlying the entire synthetic adjustment methodology. Even if the tests discussed under Guideline One and based on the homogeneity assumption had proven favorable to adjustment, this evidence would weigh against adjustment. Instead, both considerations imply that the adjusted figures are not of sufficient quality to be usable for reapportionment and legislative redistricting. Thus, this Guideline weighs in favor of a decision not to adjust the census.

Guideline Three

The 1990 census may be adjusted if the estimates generated from the pre-specified procedures that will lead to an adjustment decision are shown to be more accurate than the census enumeration. In particular, these estimates must be shown to be robust to variations in reasonable alternatives to the production procedures, and to variations in the statistical models used to generate the adjusted figures.

Explanation

The Bureau of the Census will determine the technical and operational procedures necessary for an adjustment decision before the results of the post-enumeration survey are known. This procedure shall be chosen to yield the most accurate adjusted counts that pre-census knowledge and judgment can provide. The Bureau of the Census will then assess the components of systematic and random error in the procedure and it will assess the robustness of the estimates generated from that procedure. Various procedures and statistical models can be used to generate estimates of net overcounts or net undercounts and adjustment factors. This guideline specifies that a set of procedures for generating proposed adjusted counts will be determined in advance of receiving the 1990 post-enumeration-survey estimates. This guideline requires that these procedures be evaluated. These evaluations will identify other procedures and models that could be considered as reasonable alternatives to the chosen production process. These alternatives will be used to assess the accuracy and precision of the proposed adjusted counts. In addition they will be used to assess whether and by how much the adjusted counts could vary if alternative procedures were used.

Discussion

There are three questions raised by this guideline that have not already been dealt with in my conclusions about accuracy in the discussion of Guideline One:

(1) Were the procedures followed pre-specified?

(2) Were the estimates robust to production alternatives?

(3) Were the estimates robust to alternative statistical models?

Prespecification

The question of prespecification is difficult. No production of the complexity of the census or the PES can be completely prespecified. There are always unforeseen events that occur and that require modifications to the plan. In fact the procedures for the PES and for generating an adjusted count of the population were, broadly speaking, as prespecified. Even though there were several decisions, of some importance, made in the course of the estimation procedure, all were made solely by the career professional staff at the Census Bureau. The decisions reflected the best professional judgment of those career public officials vested with the responsibility for the census and the PES.

First, a decision was made not to combine DA with the PES to generate dual-system estimates. Second, there was a choice made of carrier variables to be used in the smoothing process. These variables help determine how the raw adjustment factors (published on April 18, 1991) are converted to the smoothed adjustment factors (published on June 13, 1991). Finally, in the smoothing process itself some observations which were either peculiar in their magnitude or their variance were treated specially. The Special Advisory Panel members were consulted in trying to deal with the difficulties encountered in the smoothing process.

Kruskal, Tarrance, and McGehee all raise concerns about the prespecification question. It is Kruskal's impression "that choice of the so-called smoothing procedures was profoundly based on PES results. One might indeed argue that such a choice has major merits, but it does not seem to me to follow the Guideline"[95] McGehee argues more strongly: "One's confidence is further eroded when--in an effort to explain unexpected results--the Bureau resorts to novel explanations, re-manipulation of the data, and a variety of other *ad hoc* techniques."[96] Tarrance expresses similar concerns: "Some procedures have been pre-specified but, as in all statistical operations, others have been suggested and/or adopted as the operations have been carried out. I have been concerned to note that a number of changes have been made in the last 18 months."[97] He also notes that "any attitude of 'if the numbers don't come out the way we think they should we can changes plans' is diametrically opposed to what good government policy should allow. Furthermore, it is clear that the adjustment process is a statistical operation which has never been done before and there are many last-minute decisions being made."[98]

Ericksen, Estrada, and Tukey either find no problem with the prespecified procedures or do not mention it. Wolter notes that there were procedures in the enumeration that were changed late in the enumeration process that affected the PES; however, PES managers were able to

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[95]Kruskal, page 4.

[96]McGehee, page 4.

[97]Tarrance, page 20.

[98]Tarrance, page 21.

cope with the changes in procedures. He also notes the decision not to combine the PES and DA and the smoothing decisions made during the PES process. He finds that each was treated with a high degree of professionalism.[99]

In any estimation process unforeseen difficulties will arise and no estimating system can be put on automatic pilot. The unsettling problem is that, as we will see below, the choices that occurred did make a difference in the outcome of the adjustment--differences large enough to change the implied apportionment of the Congress--and that different choices producing different results may have been made by other responsible individuals in the exercise of their best judgment. The enumeration process itself cannot be influenced in such a way. Any individual decision either has a tiny impact or is so distant from the final result (both in temporal terms and in statistical terms) that the decision maker does not know the import of his decision. This is simply not true of the types of decisions made here in the course of calculating PES count estimates. State counts were easily available to the persons deciding which smoothing method would be used. Although I believe that the decisions were made for sound professional reasons in the 1990 census, using these adjustment mechanisms opens the possibility for manipulation of future post enumeration surveys in ways that are unavailable in traditional census procedures. This weighs heavily against an adjustment of the census.

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[99]Wolter, page 9-10.

Robustness of the Results

I will combine the discussions of the robustness to alternative statistical methods and production methods in this section because they are for the most part intertwined.

One area in which statistical models could have an impact on the result of the PES is in the imputation of match status. As individuals from the PES are matched back to the census some cannot be definitively declared matched or unmatched, often due to missing data. The missing data were imputed to the unresolved cases and a match status was then assigned using a series of statistical models. The levels of missing data were sufficiently low that variation in these models made essentially no difference in the outcome of the PES (Studies P1 and P2). Here I concur with the Undercount Steering Committee judgment that the outcome is robust to the alternatives considered, although, as noted above, Wachter warns that unexamined assumptions underlie the statistical imputation models and, in fact, the results could be sensitive to these assumptions.[100]

Wachter notes that the sensitivity of the imputation results to these unexamined assumptions, however, could have an impact on the apportionment of the House of Representatives that would be implied by an adjustment. He considers five alternative adjustment calculations: the smoothed estimates, the raw estimates, two of his imputation alternatives, and a fifth estimate that uses state adjustment factors based only on PES data gathered within that state. He finds that each method implies a different apportionment of the House, and eleven states either gain or lose a seat in

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[100]Wachter, pages 21-22.

at least one of the five alternatives. This instability in the results of the adjustment for the Constitutional purpose of the census argues strongly against an adjustment.[101]

The second area in which different methods could have affected the outcome is in poststratification. All the members of the same post-stratum receive the same adjustment factor. If post-strata are chosen differently then outcomes may be different. The Census Bureau investigated whether changes in the post-stratification by census division would change the results significantly by using an alternative post-stratification by state. This showed that three states would have had significantly different counts. It is also important to note that any variation due to uncertainty in post-stratification is not incorporated in the total error model.

A third area of concern is that of smoothing procedures. Smoothing is a technique that is used to remove some of the effects of random variability in the estimates of the adjustment factors for the 1392 post-strata, while

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[101]In connection with the loss function studies discussed in Guideline One, the Census Bureau compared the apportionment implied by the census to that implied by the so-called target population. They differed by two seats. The Bureau then considered 1000 random draws from the production DSE statistical distribution and compared the apportionment that would result from each draw to the target population apportionment. For 391 of the draws the production DSE apportionment did not differ from the target apportionment. For 567 of the draws there was a difference of one seat. For 42 there was a difference of two seats. This only shows that the PES estimator of apportionment differed from the target apportionment by 0.65 seats on average. It says nothing about the quality of the census, since the target is simply another adjusted estimate of the population, as the discussion of Guideline One demonstrates.

preserving the meaningful systematic differences between subgroups. Since these adjustment factors are the results of a statistical process, they are subject to random variation. If you had taken a second sample the answer would be different. But some variation across the different poststrata is a result of real differences in behavior not simply random statistical variation. The point of the smoothing exercise is to remove the *random* variation while attempting to retain the real differences.

Smoothing involves three major judgmental decisions--the treatment of outliers, the variance pre-smoothing, and the choice of so-called carrier variables. We consider first the treatment of outliers. This is an extremely complex problem that posed great unforeseen difficulty for the Census Bureau. Let me start with a simple observation. When the final PES numbers were announced on June 13, 1991, a modified set of PES numbers was included as one of the alternatives considered as a possible set of final PES numbers but not selected. This set of numbers stood apart from the census and was closer to the selected method than the census. Thus it was a candidate for selection. This alternative, had it been chosen, would have implied a different apportionment of the Congress than the selected method. If the selected method were chosen and if the Congress were reapportioned on the basis of those numbers, California and Arizona would gain one more seat each and Pennsylvania and Wisconsin each would lose one seat compared to the census. Use of the modified PES estimates instead of the selected method would have resulted in a shift of only one seat--from Wisconsin to California. It is important to note that the only difference between the two methods is that, in the selected PES. 28 outlying variances out of 1392 variances were omitted from variance

smoothing. In the modified version these 28 points were not omitted. Thus changing the treatment of only 2% of the points could have changed the allocation of one seat in the House of Representatives. I have included in Appendix 10 a list of State, county, and city populations under three smoothing schemes: the selected method, the modified method, and the raw adjustment without smoothing. Some of the sensitivities to smoothing choice are evident from these charts themselves. Let me highlight a few:

• The undercount rate for Arizona is estimated to be 2.8% under the modified PES smoothing scheme and 3.3% under the selected PES smoothing scheme.

• The undercount rate for Maryland is estimated to be 2.5% under the modified PES smoothing scheme and 1.8% under the selected PES smoothing scheme.[102]

• The undercount rate for the District of Columbia is estimated to be 5.6% under the modified PES and 5.0% under the selected PES smoothing scheme

• The undercount rate for Akron, Ohio, is estimated to be 2.2% under the modified smoothing scheme and 3.0% under the selected PES smoothing scheme.

• The undercount rate for Pasadena, Texas, is estimated to be 3.7% under the modified smoothing scheme and 3.0% under the selected PES smoothing scheme.

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[102]If a state is estimated to have a greater than average (*i.e.*, 2.1%) undercount it gains proportionally from an adjustment. States below 2.1% lose. Thus the choice of adjustment method, had adjustment been used, would have determined whether Maryland was a winner or loser.

• The undercount rate for Miami, Florida, is estimated to be 5.4% under the modified smoothing scheme and 4.6% under the selected PES smoothing scheme.

The Census Bureau analysis emphasizes that the set of various population estimates derived from different smoothing methods are broadly similar in the counts they produce and, as a group, distinct from the census enumeration. I believe that, in fact, it would be difficult to choose on any objective statistical grounds among the host of alternatives the Census Bureau considered which do in fact produce different results for the Constitutional purposes of the census. As noted in the discussion of Guideline One, accuracy must be considered in terms of the distribution of the population not numeric accuracy. The Census Bureau analysis does not consider the similarity in terms of the population distribution of the sets of estimates or whether the variance inherent in those estimates, warrants the discarding of the census in favor of one of the particular estimates.

Wachter's analysis of the smoothing procedures that the Census Bureau used in developing the adjustment estimates also raises some serious concerns. He believes that "smoothing has turned out to be the most problematic part of the adjustment calculations," and that "the evidence leads me to fear that the smoothing has had more of an effect on the final adjustment than can be easily justified."[103]

As noted above, smoothing is a technique that is used to remove some of the effects of random variability in the estimates of the adjustment factors for the 1392 post-strata, while attempting to preserve the meaningful systematic

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[103]Wachter, page 33 and page 34.

differences. This is done using a technique called linear regression that "holds constant" attributes of the population we expect to be associated with low or high undercount rates in an attempt to isolate the random variation. The choice of the attributes to be "held constant"--also called carrier variables--is a matter of concern and will be discussed below. These regressions yield estimates of adjustment factors that supposedly have been purged of their random variability. Wachter characterizes these estimates as being "flattened."[104]

To calculate the smoothed factors one takes an average of the raw adjustment factor (before flattening) and the flattened adjustment factor--but a weighted, not a simple, average is used. For a particular post-strata, if you have observed a lot of random variability, the smoothed factor is chosen to be closer to the flattened factor--that is, the weight on the flattened factor is high and the weight on the raw factor is low. On the other hand, if the raw adjustment factor is fairly stable and does not show much random variation, you put more weight on the raw factor and less on the flattened factor when you calculate the smoothed factor. The smaller the random variation in a poststratum, the more the smoothed factor relies on the observed data and the less it relies on the regression estimate.

But there is another level of complication. The measures of random variation, called variances, are themselves subject to random variation and, as happened in this PES, the variances can be large and unruly. The variances themselves vary a lot. When there are large measured variances, the smoothed factors are closer to the

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[104]Wachter, page 35.

flattened estimates and on the whole, you tend to get lower adjustment estimates. The Census Bureau decided to soften this effect by pre-smoothing the variances before smoothing the adjustment factors. So there are two levels of smoothing--first variances, then factors.

Wachter shows that "the effect of deciding to use pre-smoothed rather than unsmoothed variances is to raise many of the adjustment factors by several percentage points and raise some by more than six percentage points. The changes introduced into the adjustment factors are of the same order of magnitude as the sizes of the adjustment factors themselves. These are huge changes for a decision of detail."[105] The fact that the statistical artifice of variance smoothing is making substantial differences in adjustment factors is disturbing. As Wachter observes:

The raw adjustment factors are at only one remove from the data, the PES fieldwork that is the real information we have. Assumptions go into their computation and they are subject to many kinds of random and systematic errors. Notwithstanding these limitations, there is a fairly direct link between people missed or miscounted somewhere in a sample block and a big or small raw adjustment factor. Smoothing the factors themselves involves operating at two removes from the data, importing more assumptions, but incorporating information about variability that comes ultimately out of fieldwork. Pre-smoothing the variances that go into smoothing the adjustment factors is at three removes from the data. It incorporates little, if any, further

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[105]Wachter, page 36.

empirical information. It depends entirely on another set of assumptions.[106]

The fact that pre-smoothing makes so much difference reflects the irregular and variable nature of the PES data. The implication is that the assumptions underlying the statistical models being used are important determinants of the outcome of the adjustment calculation.

Wachter discusses at length the reasons for variance pre-smoothing, but one argument he made was particularly striking. The variance pre-smoothing essentially results in large variances being made smaller and small variances being enlarged slightly. This seems to be the opposite of what is desired. A large variance means that the adjustment factor is not well estimated--it is noisy--so when smoothing the factor you should put *more* weight on the so-called flattened factor. Decreasing the large variance means you put *less* weight on the so-called flattened factor. The opposite argument can be made for small variances. Therefore, variance pre-smoothing is arguably having a result exactly opposite from that intended by the smoothing process. In addition, because low adjustment factors tend to have small variances, pre-smoothing makes those variances higher and thus systematically discounts the evidence of low net undercounts.[107] In other words, presmoothing tends to

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[106]Wachter, page 37.

[107]Wachter, page 39.

artificially inflate already high undercount rates and artificially dampen already low undercount rates.[108]

Wachter cites three other problems with variance pre-smoothing: First, the variance smoothing is not directed at making covariances more accurate. In his view the motivation for presmoothing was heuristic. Second, there are no strong reasons for choosing among the many models available to actually smooth the variances. Third, the choice about variance pre-smoothing affects not only the adjustment factors but the total net adjustments for broad aggregates of the population. For example, the variance presmoothing changes the estimated net undercount in the West South Central region from 2.95% to 2.76%. In the East South

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[108]In their letter submitted on July 11, 1991, Ericksen and Tukey dispute Wachter's concerns over variance pre-smoothing and contend that variance pre-smoothing helped the accuracy of the adjustment. In his rebuttal letter, submitted on July 12, 1991, Wachter stands by his statements. Both letters are contained in Appendix 16. It is difficult to referee this dispute in the eleventh hour, especially since the lateness of the Ericksen/Tukey letter gave little chance for Wachter to prepare a detailed response. In checking with the Census Bureau, I have found that, in fact, the pre-smoothing operation was agreed upon in advance, but in mid-May difficulties were encountered in that operation. The Census Bureau consulted with the panel and Tukey offered several remedies that Hoaglin and Glickman refer to as "prescriptions in the spirit of a mustard plaster . . . not a tightly specified procedure derived from established statistical theory." (Appendix E of Ericksen, *et al.*, page 15.) Although Hoaglin and Glickman, seem to indicate that the choice among the three remedies should not have much effect on the ultimate smoothed estimates, one of the three shows exactly the phenomenon that concerns Wachter, of raising high variances and lowering small ones. (See Appendix E of Ericksen *et al.*, page 22.) In fact, the choice of the "mustard plaster" did have an effect on apportionment (see main text above). Finally as Wachter points out, there is disagreement as to what constitutes a reasonable alternative.

Central, it changes from 2.43% to 2.68%.[109] Again, these are changes of a very significant magnitude given the size of the national net undercount.

The choice of carrier variables in the statistical regression procedures used to smooth the adjustment factors could have a significant impact on the outcome. The Special Advisory Panel commissioned a study by David Hoaglin to study this impact. This study is used extensively in the arguments of Ericksen, Estrada, Tukey, and Wolter. The conclusion was much the same as with the various treatment of outliers. The carrier variable choice made a difference, although in absolute numeric terms not a huge difference. The 13 models Hoaglin produces look roughly similar to each other and to the production PES estimates all of which are distinct from the census. The same is true if relative shares for the thirteen evaluation post-strata are computed--the various carrier variables produce results closer to the production PES estimates than to the census. No results are available at finer geographic levels (such as states, counties, or cities.) Wachter's assessment of the carrier variable selection is that "the effects of variable selection are not negligible but they are not a central issue."[110]

Ericksen points out that the total error model shows that the effects of the PES biases on population shares for the 13 large evaluation post-strata are small. In addition, he contends that his examination of the two estimates in the June 13, 1991, press release, shows the state population shares to be stable for the states that would gain or lose seats

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[109]Wachter, page 39 and Table 3.1.

[110]Wachter, page 41.

if the House of Representatives were reapportioned on the basis of adjusted counts. His reasoning is that the adjustments are larger than one or two times the standard error.[111] The difficulty with his reasoning is that it only considers sampling variability and ignores whether the shares are robust with respect to alternative statistical and production methods.

Conclusions

I have previously concluded that the adjusted figures have not been shown to be more accurate than the census enumeration. That is all that is required under Guideline Three to conclude that the census may not be adjusted. There are, however, additional considerations under Guideline Three under which I also conclude the 1990 census should not be adjusted.

It has proved virtually an impossible task to prespecify the adjustment procedure. It is equally impossible to prespecify the Census procedure. However, in the adjustment procedure an individual or responsible group must make choices which have politically significant effects on the counts that can be transparent to those making the choices. This puts the counts at greater risk of being manipulated than the census. There is no evidence of unprofessional or political manipulation in the 1990 PES program.

The results of the adjustment procedure are broadly robust at an aggregate, national level. However, although various alternatives seem to distribute counts in roughly

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[111]Ericksen, page 3.

similar ways, small changes in methodology can move seats in the House. It is also true that small changes in the census enumeration can move seats in the House as well, but no individual involved in the enumeration process can predict how. That is not true for the decisions for adjustment that cannot be or were not prespecified.

One of the most problematic parts of the adjusted process was the bundle of statistical techniques contained in the smoothing process. These techniques relied heavily on statistical assumptions, resulted in large changes in adjustment factors, and may very well have led to an overstatement of the undercount. Thus, this guideline weighs in favor of a decision not to adjust.

Guideline Four

The decision whether or not to adjust the 1990 census should take into account the effects such a decision might have on future census efforts.

Explanation

The Decennial Census is an integral part of our democratic process. Participation in the census must be encouraged. Respect for the objectivity, accuracy, and confidentiality of the census process must be maintained. Accordingly, if evidence suggests that adjustment would erode public confidence in the census or call into question the necessity of the population participating in future censuses, then that would weigh against adjustment.

On the other hand, if evidence suggests that the failure to adjust would erode public confidence in the census

and thus result in widespread disinclination to participate in future censuses, that would argue for adjustment. The extent to which a non-adjustment would be perceived as a politically motivated act, and thus would undermine the integrity of the census, should also be weighed in making any adjustment decision.

Discussion

There is no scientific or quantitative means by which we can determine with reasonable certainty the impact of a decision made in 1991 on human behavior and activities that will occur in the year 2000 and beyond. Indeed, this guideline merely requires that we consider the effects that our decision today might have on future census efforts. In my view, such consideration requires that we examine relevant information and draw upon past Census Bureau experience as well as common sense in making rational predictions about such effects.

The universe of "future census efforts" encompasses a wide variety of activities: the efforts of individuals in completing census forms and cooperating with enumerators; the efforts of state and local officials, civic leaders and special interest groups in supporting outreach programs, public awareness campaigns, and active involvement in counting their target populations; the efforts of Census Bureau workers in enumerating as many households as possible; the efforts of Census Bureau professionals in making judgments and decisions about procedures to achieve the most accurate counts possible and to ensure objectivity and integrity of the process; and the efforts of the Department of Commerce, which includes the Census Bureau, to ensure appropriate levels of funding from

Congress to support its enumeration activities. Each of these activities affects participation in and coverage of the census. To the extent that we can draw on relevant data, observations, and experience, consideration of the effects of decisions to adjust or not adjust on each of these activities is appropriate.

Sources relevant to our considerations include a study by the National Opinion Research Council (NORC),[112] public comments on the adjustment decision,[113] comments on Guideline Four submitted by the members of the Special Advisory Panel,[114] and discussions with experienced Census Bureau officials. Based on these sources, it is my conclusion that there is greater risk of potential harm to future census efforts as a result of a decision to adjust than as a result of a decision not to adjust. A discussion of the possible effects on each of these activities follows.

Effects on Individual Participation

Recently, the Census Bureau commissioned a study by the National Opinion Research Corporation (NORC) to try to measure how an adjustment might affect future census behavior by means of a telephone survey of a representative national sample of 2,478 households.

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[112]See Appendix 11. National Opinion Research Corporation, The Potential Impact of Adjusting of Not Adjusting the 1990 Census, June 19, 1991.

[113]See summary of comments on Guideline Four in Appendix 8.

[114]Ericksen, page 3; Estrada, page 20; Kruskal page 4; McGehee, page 33; Tarrance page 23; Tukey, page 2; and Wachter, page 42.

Persons were asked to evaluate the likelihood that they would participate in the next census. Then they were asked how that likelihood would change if there were an adjustment and how that likelihood would change if there were not an adjustment. The results were paradoxical--both a decision to adjust and a decision not to adjust would decrease the likelihood of participation.

The survey shows that the adjustment issue is not high in public consciousness or well understood. Only one-quarter (23.4 percent) of persons said they had seen or heard anything about the census in the past few months. When probed about what they had seen or heard, only 14.1 percent spontaneously mentioned anything to do with adjustment, undercount or errors in the census count. When told that people are talking about whether or not to adjust the results of the census to correct for errors in counting the population, 22.3 percent then recalled they had seen or heard something about this. Probing questions showed that only 4.9 percent understand the adjustment issue.

Prior to any discussion of adjustment, a total of 84 percent of those surveyed stated they were "extremely or very likely to participate" in the next census. After the discussion of adjustment, 75.5% were "extremely or very likely to participate" in the future if the census were adjusted, as compared to 71.3% if it were not. Thus, while these results indicate that intention to participate in future censuses is marginally higher if the census were adjusted than if it were not, there is less inclination to participate in the future regardless of the outcome of the decision. As NORC points out in its conclusions: "While large numbers remain very favorably disposed to participating in the next and future censuses, this intention is a very slippery,

ephemeral and changeable one . . . subject to influence by factors like the adjustment decision or, more likely, from the controversy or fallout emanating from the events that follow that decision." The survey also indicates that, prior to any discussion of adjustment, 5.5 percent were "not very likely" to participate in the next census. A decision to adjust would result in 5.3 percent in the "not very likely" category. A decision not to adjust would result in 8.6 percent in this category.

It is unclear what this survey meaningfully demonstrates, other than confusion over what an adjustment is and the negative effect of the controversy over adjustment on the present perception of a person's likelihood of participation in future censuses. However, as the survey report emphasizes, the need to explain the issue of adjustment and its implications will necessarily outlive the survey and the adjustment decision itself, and the inability of the surveyors to explain the issues to those surveyed is certainly grounds for some caution.

The division of public opinion on the future effects of adjustment indicated by this survey is consistent with the division of opinion demonstrated by the public comments received by the Department. While some claimed that an adjustment would erode public confidence in the census and thus lower future participation, others claimed that a decision not to adjust would erode public confidence and thus lower future participation.

The explanation of this Guideline states that evidence of widespread disinclination to participate in future censuses as a result of a decision not to adjust would weigh in favor of an adjustment. Neither the public comments nor the

NORC survey provide evidence that this will occur. Indeed, the NORC study indicates that a decision not to adjust would make only 8.6 percent "not very likely" to participate in the future, just 3.1 percent more than those who would be "not very likely" to participate in any event. Thus, while there would be some additional disinclination to participate, it would not be widespread.

The explanation of this Guideline also states that evidence that calls into question the necessity of the population participating in future censuses would weigh against an adjustment. A number of the public comments express concern that an adjustment would result in the perception that an individual's failure to participate would be compensated by an adjustment and thus lower participation. In light of this, I am skeptical rather than optimistic about the likely motivation of individuals to participate in the future if an adjustment were made. However, I do not find compelling evidence in either direction regarding the effects of a decision on future individual motivations.

Effects on Complete Count Efforts by State, Local, Civic, and Interest Group Leaders

A number of the public commentators, as well as Wachter[115] and Tarrance,[116] expressed serious concerns that an adjustment would negatively affect the efforts by state, community, civic, and interest group leaders who traditionally provide essential support in encouraging participation in the census. I share these concerns.

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[115]Wachter, page 42.

[116]Tarrance, page 23.

Currently, it is in the interests of every governor, mayor, and interest group to help get their target populations counted. The Census Bureau works closely with such officials and groups for two to three years before census day. The efforts include mapping, address compilation, massive advertising campaigns, and public awareness activities. I agree with my advisors who believe that such cooperative efforts are absolutely critical to the Census Bureau's mission to conduct an actual enumeration of all persons residing in the United States on census day, and particularly critical in reaching the hardest to count. Like others, I am concerned that an adjustment will remove the incentive that these public officials and groups currently have to provide active support in achieving a complete count.

Based on the public comments, it is clear that many public officials believe that an adjustment will correct specific errors they have identified in the count of their communities. With such mistaken impressions, it is unrealistic to expect these leaders to put census outreach efforts above the many other claims on their limited resources. As Wachter predicts, complete count committees, local advertising, celebrity appearances, and special programs to ensure more complete minority counts would be likely to suffer as a result of an adjustment.[117]

Senior officials at the Bureau, including the Director, agree with this assessment. At the same time, the Director believes that states and cities will still have an incentive to encourage participation in order to get the best possible city planning data. I find this unpersuasive in light of the numerous public comments received from local officials

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[117]Wachter, page 42.

demonstrating a profound lack of understanding of the effects of an adjustment and a misplaced faith in its ability to correct particular problems they have identified in their communities.

I find no evidence indicating that local support would decrease as a result of a decision not to adjust the census.

Effects on Funding of Future Censuses

Tarrance[118] and Wachter[119] expressed concern that an adjustment would adversely affect the Department's ability to obtain sufficient funding for future censuses. I share this concern. The most expensive element of the census is the extraordinary effort to count the last five percent. With the illusory prospect of an adjustment to achieve a full count in congressional districts and states, it would simply be unrealistic to expect Congress to appropriate funds to the full extent necessary to complete an enumeration of the hard to count. Without the funds needed to complete an enumeration, the quality of census data, especially in smaller areas, would be jeopardized. There appears to be little risk that Congress would deny such funds as a result of a decision not to adjust.

Effects on Efforts by Census Enumerators

As Wachter recognized, the future effects of a decision to adjust could be most severe on those temporary

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[118]Tarrance, page 23.

[119]Wachter, pages 42-43.

workers who must actually conduct the enumeration process.[120] The difficulties of hiring, training, and supervising the thousands of temporary census employees are well-known and well-documented. It is time-consuming, often tedious, and occasionally dangerous work that requires extraordinary diligence for less than commensurate pay. There is a real risk that, with an expectation of a correction through adjustment, the field staff would not have the same sense of commitment and public mission in future censuses and, as a result, careless and incomplete work would increase, thereby decreasing the quality of census data. These are the workers the Bureau depends on to collect the data from the groups that are hardest to enumerate. If these data suffer, the information lost at the margin is information that is especially important to policy development.

I am unaware of any concerns that census enumerators would be less motivated as a result of a decision not to adjust the census.

Effects on the Independence of Bureau Professionals and the Integrity of the Census

Senior Bureau officials as well as Tarrance[121], Wachter[122], and McGehee[123] have raised concerns about the potential for manipulation of an adjustment for partisan purposes. As Wachter recognized, adjustment may pose

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[120]Wachter, page 43.

[121]Tarrance, page 5.

[122]Wachter, page 44.

[123]McGehee, page 33.

significant risk to the technical independence of Census Bureau professionals who have traditionally been free from external influence in the implementation of their mission.[124] A principal drawback of adjustment is the fact that a few technical decisions can swing the outcomes of apportionment, redistricting, and Federal funding allocation. Decisions that may be nearly equally defensible from a technical standpoint may have very different outcomes which can be known in advance of the decisions. Thus, adjustment opens the door to manipulation of the census for partisan gain. It would therefore greatly increase not only external scrutiny and second-guessing of Census Bureau professionals and prospective candidates for key technical positions, but also inevitably increase pressure to politicize these positions. This would impose an even greater burden on technical staff in their attempts to make scrupulously objective and fair decisions. These risks pose serious threats to the integrity and objectivity of future censuses.

Concerns have also been expressed in the public comments and by Wolter[125] that a decision not to adjust the census may be seen as politically motivated and therefore adversely affect the integrity of the census. While I recognize these concerns, I believe they are outweighed by the likely adverse effects on future census efforts from an adjustment.

Conclusion

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[124]Wachter, page 44.

[125]Wolter, page 11.

Based on the information available, I conclude that an adjustment would adversely affect future census efforts to a greater extent than any adverse effects of a decision not to adjust. The evidence indicates that the controversy over adjustment is likely to have a negative effect on future censuses regardless of the outcome of the adjustment decision. I am concerned that an adjustment would reduce state and local support for future censuses, adversely affect the Department's ability to obtain appropriate funding for future censuses, adversely affect the quality of the work done in the future by temporary census enumerators who are essential in reaching the hard-to-count, subject the Census Bureau to partisan pressures, and create the possibility for political manipulation of future census counts. Thus, this guideline weighs in favor of a decision not to adjust.

Guideline Five

Any adjustment of the 1990 Census may not violate the United States Constitution or Federal statutes.

If an adjustment would violate Article I, Section 2, Clause 3 of the U.S. Constitution, as amended by Amendment 14, section 2, or 13 U.S.C. section 195, or any other constitutional provision, statute or later enacted legislation, it cannot be carried out.

Discussion

In addition to the technical and operational aspects of the census and the proposed adjustment which I have considered in connection with Guidelines One through Four, I have also considered the constitutional and statutory implications of an adjustment decision. In my view, neither

the Constitution nor the relevant statutory provisions are themselves conclusive as to whether the proposed adjustment would be unconstitutional or unlawful because the *sine qua nons* of constitutionality and lawfulness and the propriety of adjustment are the same: the need for unambiguous accuracy of the adjustment methodology and data. Because analysis of the significant legal issues is thus dependent upon the statistical analysis, which itself mandated my decision on the substantive merits not to adjust, it was unnecessary to decide the legal issues. This Guideline therefore only served to verify, not determine, my decision.

Constitutional Considerations

While not free from doubt, it appears that the Constitution might permit a statistical adjustment, but only if it would assure an accurate population count. See *Carey v. Klutznick*, 508 F.Supp. 404 (S.D.N.Y.1980); *Young v. Klutznick*, 497 F.Supp. 1318 (E.D. MI 1980). By implication, then, a determination that the proposed adjustment would not discernably or reliably improve the accuracy of the headcount would raise uncompromisable constitutional concerns, inasmuch as adjustment would not be contributing to the most accurate count, but rather would be injecting additional uncertainty and error. Thus, while the Constitution might not, *per se*, bar an adjustment, the question of whether a particular adjustment is constitutionally valid can only be made after the final form of the adjustment is known.

This principle--that an adjustment must be consistent with the constitutional requirement of "enumeration," i.e., an accurate count free from politicization and equivocation--is also supported by the intent of the Framers that the census

utilize verifiable methods which obtain an accurate population count. This goal of accuracy would not be met, to give the clearest example, by mere guesswork. The central question under the Constitution thus supports, though it did not determine, my conclusion; the need for verifiable methodology and unambiguous data are the modern-day requisites of what was explicitly desired by the Framers when they provided for an "actual Enumeration." That phrase commands for all time that what shaped the details of the very first congressional apportionment (there was then as yet no census)--guesswork and political deal-making--never would be permitted again.

As the discussion of Guideline One demonstrates, the evidence of improved accuracy resulting from the proffered adjustment methodology is at best mixed. That evidence is not sufficient as a matter of substantive merit and, derivatively, it also fails the test prescribed under the Constitution. While the essence of my decision not to adjust rests in the uncertainty of the proposed adjustment and the questionable nature of the data produced, that very uncertainty and question mark the rough shoals of politicization that the framers mandated be avoided when they required "enumeration," that is, an objectively accurate count.

Census Act Provisions

The Census Act contains two provisions authorizing the Secretary of Commerce to use sampling to conduct the decennial census. See 13 U.S.C. section 141(a) and 13 U.S.C. section 195.

Section 141(a) provides in pertinent part:

The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, *including the use of sampling procedures and special surveys.* (Emphasis added.)

Section 195 provides:

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title (Emphasis added.)

While judicial opinion is unsettled on the question of whether adjustment violates section 195, the majority of courts considering this issue have ruled that section 195 permits an adjustment if the adjustment method makes the census more accurate. See *Cuomo v. Baldrige*, 674 F.Supp. 1089 (S.D.N.Y. 1980), *Carey v. Klutznick*, 508 F.Supp. 404, at 415 (S.D.N.Y. 1980); see also, *City of Philadelphia v. Klutznick* 503 F.Supp. 663 at 679 (E.D. PA 1980); *City of New York et al. v. United States Department of Commerce. et al.*, (S.D.N.Y. 1990). *But see Orr, et al. v. Baldrige, et al.*, U.S.D.C., S.D. Ind., No. IP 81-604-C, July 1, 1985. Even assuming that the statute does not *per se* prohibit an adjustment, not all forms of adjustment would be sanctioned and the legality of the adjustment could only be determined after the form of adjustment is chosen. Thus, as with the constitutional issues, the analysis of the statutory issues cannot be separated from the analysis of the accuracy of the chosen adjustment method. Because the evidence of

improved accuracy from an adjustment is insufficient, the standard articulated by the majority of these courts is not met. While this legal conclusion was not dispositive, it affirms my decision not to adjust based on the substantive merits.

Conclusion

The question whether the chosen method of adjustment would violate the Constitution and federal statutes depends upon the substantive analysis of whether accuracy of the census is improved by an adjustment. Because there are other compelling substantive reasons not to adjust, legal considerations did not provide a basis for my decision.

Guideline Six

There will be a determination whether to adjust the 1990 census when sufficient data are available, and when analysis of the data is complete enough to make such a determination. If sufficient data and analysis of the data are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust the 1990 census.

Explanation

It is inappropriate to decide to adjust without sufficient data and analysis. The Bureau will make every effort to ensure that such data are available and that their analysis is complete in time for the Secretary to decide to adjust and to publish adjusted data at the earliest practicable date and, in all events, not later than July 15, 1991, as agreed to in the stipulation. Note, however, that the

Department and the Bureau have consistently stated that this is the earliest possible date by which there is a 50 percent chance that an analysis could be completed on which a decision to adjust could be based. If, however, sufficient data and analysis of the data are not available in time, a determination will be made not to adjust the 1990 Census. The coverage evaluation research program will continue until all technical operations and evaluation studies are completed. Any decisions whether to adjust other data series will be made after completion of those operations.

Discussion

In order to evaluate the quality of the census and the post-enumeration survey, the Census Bureau conducted an extensive and ambitious research program designed to provide timely information on which to base a decision by July 15, 1991. Due in part to some unexpected anomalies in the data, progress on the evaluation was delayed in the final critical weeks, leaving the Bureau little time to complete its analyses. These pressures may have affected the quality of the research, and there is still much that we do not know about the quality of the PES and the adjusted counts relative to the enumeration. Nonetheless, based on the record available, I believe there is sufficient evidence to make a decision on adjustment.

The Census Bureau has done a remarkable job of condensing into a few short months a challenging evaluation program that was comparable to a multi-year research program for the 1980 census and the 1987 test of adjustment-related operations. The Census Bureau produced highly technical research on a very tight production schedule, using tools that were on the cutting edge of

statistical theory and survey methods. The dedication, professionalism and hard work of Census Bureau staff under often intense pressure is truly commendable.

Although sufficient data are available for me to decide the adjustment question, it is important to note that because of the court imposed deadline for the decision, the analyses of the data are far from compete. All parties involved in the decision making process have expressed a desire for more time to digest and analyze the voluminous material created by the research program. I am particularly concerned about problems in data quality and analysis that were revealed, or occurred, in the final weeks before the decision.

Good research requires a careful weighing of the evidence, especially when it is on the frontier of the science. When such novel research is to be used for such far-reaching policy purposes, it requires discussion with peers who have not been intimately involved with the details so that some perspective can be gained. It benefits from probing questions, from looking at the data from different perspectives, from the use of alternative models and from intense and independent professional scrutiny. The time schedule simply did not permit a full range of such activities.[126]

Before the release of the selected and modified PES numbers, an inconsistency was found in the calculation of the margins of error upon reviewing the proposed release in its penultimate form. This was not a subtle error, but one

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[126]Kruskal makes a similar point (Kruskal, page 6) as does Tarrance (Tarrance, page 27).

that should have been caught by a careful cross-checking of the tables. After being informed of the inconsistency, the Census Bureau began work to discover its source. Fortunately, no fundamental error had been made. However, the release was delayed by almost two weeks, setting back an already tight schedule in the last critical weeks of evaluation. Such errors were the result of too much work being compressed into too little time. To its credit the Census Bureau worked hard to find the error, fix it, and ensure that accurate data were released.

Later, in reviewing the work of the Undercount Steering Committee, fundamental questions were raised about measurement of the relative accuracy of the census and the PES. The loss function analysis was found to be unconvincing. The Census Bureau was therefore asked to revisit parts of its work. As a result of these questions, the Bureau staff found an error in the calculation of the loss functions. Correction of this error changed the number of States for which the census counts were judged more accurate than the adjusted figures from 11 to 21--a substantial and significant increase.[127]

An Addendum to the Undercount Steering Committee report was filed on Thursday, June 27, 1991. In section 4 of that addendum, which is included as appendix 5, the Undercount Steering Committee states the following:

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[127]As noted in Guideline One, these numbers are for the version of the analysis in which it is assumed that the measured variance is the whole story. As discussed there, the change is even more dramatic (from 11 to 29) if the true variance is assumed to be twice the measured variance.

Given this new information, the Undercount Steering Committee members reevaluated their positions regarding the report issued on June 21, 1991 * * *

The new information added uncertainty to the decisions of the majority, but their overall conclusions were not changed. In addition, particular sections of the report present representations of committee opinions that are now weakened by the new information. The sections of the report most affected by these new data are:

The statement on page 6 of the report that 39 of 50 States are made more accurate by adjustment would be changed under the new loss function analysis; and

Page 4 of the report summarizes the conclusions of the committee regarding Guideline One. The summary indicates that the majority of the committee relied on the loss function analysis that showed that a large majority of areas were made more accurate by adjustment. This is a stronger statement than the position now held by many of the committee members.

In conclusion the overall committee position has not changed regarding adjustment, but has been weakened somewhat. These new data also underscore the points raised in report's findings on guideline 6 (see p. 12-13). When additional information, as the data presented above, becomes available, the committee acknowledges that it may strengthen or weaken its conclusions. On June 21 the committee judged that further analysis would be unlikely to change its conclusion. The majority stands by its original conclusion while acknowledging that the ongoing work, had it been

available by the date our recommendation was due, may have caused different "weighing" of the results.[128]

These eleventh-hour findings weakened a key piece of evidence favoring adjustment. Because of these two significant errors, my concerns about the sufficiency of data and the strength of analysis supporting adjustment were heightened.

A second example of the pressures of the schedule is that as of the afternoon of Thursday, July 11, 1991, just two working days before my decision would have to be announced, I received a communication from Ericksen and Tukey taking issue with some of the conclusions in Wachter's report. Although I understand that many of the issues surrounding adjustment will be debated for a long time to come, the fact that some of the members of the Special Advisory Panel feel it incumbent upon themselves to offer last minute advice reinforces my perception that a full professional airing of issues has not taken place. Wachter wrote a speedy response to Ericksen and Tukey which I received on Friday, July 12, 1991. But a last minute debate by letter is not the way to carry out the important dialogue required on these issues.[129]

Over the course of the next months and years the data will be studied, the models tested, the professional discussions joined. We do not know what will be discovered about the quality of the PES data and the models that led to the adjusted counts. I am sure that the Census Bureau will

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[128]Addendum, page 6-7.

[129]Both letters are contained in Appendix 16.

not compromise its richly-deserved reputation for thorough and careful research. We need those efforts to build toward a better census in the year 2000.

But the question is whether we should adjust the census based on the data and incomplete analysis that we have now. As Wachter notes, we must "strike a sensible balance between the need to reach closure and the need to check and study further."[130] The decision must be made on its merits.

Notwithstanding my concerns about the effect the July 15, 1991, deadline had on research efforts, I conclude that sufficient data exist to permit me to decide whether to adjust the census. I conclude that the data support a decision not to adjust. Among the facts that weigh against an adjustment are:

• The PES missed a significant number of persons whom we cannot locate. Thus we cannot judge whether the adjusted census is distributionally superior to the enumeration simply by putting back into the count those we can locate by the PES.

• At the most aggregate level, the PES would move the count of the population in the opposite direction for some demographic groups as compared to those implied by DA.

• There is no convincing evidence to suggest that the adjusted counts give a more accurate count of the distribution of the population across various levels of geography. In fact

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[130]Wachter, page 46.

the evidence indicates the census counts probably yield a more accurate measure of the distribution of the population.

• There is no convincing evidence that homogeneity within the poststrata used in adjusting the census counts is a statistically valid assumption.

• There is evidence that the estimates of the population produced by adjusting the counts are sensitive to small changes in the estimation procedure and these have significant effects.

Thus I find that the evidence presented is sufficient to conclude that the counts should not be adjusted.

Conclusion

An adjustment to the census is a fundamental change in the way we count and locate the persons residing in the United States. I am deeply concerned that if an adjustment is made, it would be made on the basis of research conclusions that may very well be reversed in the next several months. That would be bad for the country and bad for the Census Bureau.

The results of the PES evaluation studies are not yet completely analyzed. Because of the compressed time schedule imposed by the July 15 deadline, the analysis has not been subject to the full professional scrutiny that such important research requires and deserves. To the Census Bureau's great credit, the statistical tools used to calculate and evaluate the adjusted counts are at the cutting edge of statistical research. But such cutting edge research is not tried and true--it requires more thorough scrutiny before it

can be used to affect the allocation of political representation and Federal funding.

Nonetheless, the demands of good research must be weighed against the need for a timely decision. In time we may find a way of combining the PES and the census to create counts that better reflect the absolute levels and the distribution of the population. There are sufficient data and analysis to support a decision not to adjust.

Guideline Seven

The decision whether or not to adjust the 1990 Census shall take into account the potential disruption of the process of the orderly transfer of political representation likely to be caused by either course of action.

Explanation

This guideline is intended to ensure that the factor of disruption of the process of the orderly transfer of political representation is explicitly taken into account as the decision is reached. For example, many states have pointed to adjustment as being disruptive to their redistricting plans. Likewise, members of some communities that are believed to have been historically undercounted contend that if the Census were not adjusted, this would disrupt the orderly and proper transfer of political representation to their communities. The inability to ensure accuracy of counts at local levels may result in politically disruptive challenges by localities to official census counts.

This guideline recognizes that the Decennial Census plays a pivotal role in the orderly redistribution of political

representation in our democratic republic. The process used to generate the required counts must not be arbitrary either in fact or appearance. The Secretary is thus obliged to consider the impact of his decision on the fairness and reasonableness of that redistribution to all those affected. This guideline requires an explicit statement of how and to what degree adjustment or non-adjustment would be disruptive. Even though these are concepts that are not easily quantifiable, they warrant serious consideration in order for the Secretary to make a prudent decision on an issue that profoundly affects public policy.

Discussion

Among the primary purposes of the census are to provide the basis for the reapportionment of the House of Representatives and the drawing of new Congressional district lines within states. Census figures are also used by most states to redraw state legislative district boundaries, as well as by cities and counties in redrawing their own districts.

The Clerk of the U.S. House of Representatives has officially certified to each of the fifty states the number of seats allotted to the state for the 103rd Congress based on the census figures released on December 26, 1990. As of May 1991, some 20 States had already enacted either or both of their Congressional and State legislative redistricting plans. The U.S. Department of Justice is reviewing approximately one dozen of the state plans as well as those

of many cities and counties to ensure compliance with the requirements of the Voting Rights Act.[131]

If adjusted census counts were issued, Congress would have to decide whether to change the apportionment for the 103rd Congress which is to be elected in November 1992. If there were a decision to change the apportionment using the formula in current law, the Clerk would have to issue new certificates to the states advising them of the number of seats to which they would be entitled based on adjusted counts. If this change were made, the States of California and Arizona would gain one seat each and the States of Wisconsin and Pennsylvania would each lose one seat relative to the apportionment previously certified by the Clerk of the House.

It is unclear whether Congress would change the apportionment even if adjusted counts were chosen. The requirements of the statutes governing apportionment were fully met in January with the certification of the number of seats to each state. Thus, as noted in a number of public comments[132], additional action may be required on the part of Congress to change that apportionment. Whether, how, and when that action would be taken is for the Congress to determine.

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[131]See appendix 12. Turner, Marshall, "Planning the 1990 Census Redistricting Data Programs," U.S. Bureau of the Census, [hereafter Turner].

[132]See the summary of public comments on Guideline Seven in appendix 8.

It is important to remember, however, that the modern apportionment process was designed to be automatic. Once the counts were transmitted by the President to the Congress, the apportionment took place without legislative action. This design was intended to put an end to the blistering fights over apportionment that occupied earlier Congresses and, in fact, prevented reapportionment after the 1920 census, depriving citizens of a fair allocation of political representation throughout the nation for the remainder of the decade.[133] The adjustment of the Census might well create similar bitter disputes and paralyzing legal challenges over the apportionment of the 103rd Congress. The political implications of this are matters of substantial concern.

If the adjusted census were the basis for a reapportionment of the House, for the first time, the apportionment would not be determined solely on the basis of the number of persons within each State's border. This is due to the effects of cross-state groupings of post-strata in the PES on the adjustment process. For example, if the counts were adjusted, the certified population count for Delaware would depend on the results of the PES in Maryland, the District of Columbia, West Virginia, Virginia, North Carolina, South Carolina, Georgia and Florida. This is because Delaware is in the South Atlantic census division, and PES estimates are developed division-wide.

At the State level there is also likely to be confusion, disruption and extended litigation if the census figures are

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[133]See the discussion of this matter in Chapter Six of Margo J. Anderson, The American Census: A Social History. New Haven and London: Yale University Press. 1988.

adjusted. Members of the Special Advisory Panel reported on extensive testimony they received from members of the National Conference of State Legislators in Baltimore, Maryland on June 28, 1990.[134] The testimony focused on the effects of an adjustment on the states' ability to accomplish redistricting in compliance with state-imposed legal deadlines. Witnesses were concerned that the electoral process would be paralyzed by the endless litigation which two sets of census numbers would be certain to provoke. Witnesses cited major problems with adjustment: costs and delays in drawing new plans, costs of additional elections, the need for costly special legislative sessions, time constraints, and charges of partisan tampering with census data. Based on the testimony, it is clear that adjustment would create serious disruption for at least a dozen states that have early redistricting schedules or constitutional deadlines. Some states have simply delayed starting the process until after the adjustment decision. As Estrada recognized, adjustment also would require modification of recently designed districts to meet one-person, one-vote requirements.[135]

Protracted legal battles that preclude redistricting in time for the 1992 elections would deprive minority groups and others the opportunity to realize and benefit from the gains achieved through demographic shifts during the past decade. The same pattern would likely occur in redistricting efforts for city and county elections, which have already begun in a number of areas. Moreover, the adverse effects of an adjustment on the accuracy of small area counts (as

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[134]Tarrance, page 28 and Wachter, page 47.

[135]Estrada, page 23.

demonstrated in the discussions of Guidelines One through Three) would likely result in politically disruptive challenges by localities to adjusted counts.

Several public commentators, as well as Tukey,[136] noted that such disruption was foreseeable at the time of the Department's decision to consider an adjustment and that anticipated effects should not be considered in making the decision. The fact that disruption could be anticipated does not mean that it should be ignored. Indeed, consideration of disruption as a factor to be weighed in the decision was legally upheld. Moreover, as Tarrance stated, "we would not be responsible stewards of the public trust if we do not understand that we are considering more than just a scientific statistical improvement of an imperfect government program."[137] Because the census is the basis for allocating political representation in our country, the public policy implications of adjustment, including resulting political disruption, had to be considered in reaching this decision.

The potential for disruption as a result of an adjustment must be weighed against any disruption that would occur from a decision not to adjust. There will inevitably be litigation resulting from a decision not to adjust that may also delay or disrupt redistricting. Some public commentators claim that the unadjusted census is itself disruptive because it does not ensure certain groups of their rightful claims on political representation and Federal funding. These claims rely fundamentally on the conclusion that the adjusted counts better reflect the distribution of the

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[136]Tukey, page 2.

[137]Tarrance, pages 2-3.

population. As explained in the discussions of Guidelines One, Two and Three, the evidence supports the contrary conclusion.

Estrada asserted that the public good is better served by focusing on the potential benefits to millions of persons rather than on the limited number of Congresspersons and state legislators who would be affected by a decision to adjust.[138] As demonstrated previously, the evidence indicates that millions of Americans may be harmed rather than benefit from an adjustment. Moreover, we must remember that the Congresspersons and state legislators who would be affected by an adjustment are elected by and represent millions of Americans in the political process.

Comments by members of the public and by Estrada[139] noted that an adjustment would result in more equitable allocations of federal funding to states and cities, a consideration which in their view must be weighed against any disruptive consequences from adjustment. Again, this claim assumes that the adjustment provides a more accurate distribution of the population across states and localities, an assumption which is not warranted by the evidence.

Moreover, it has been demonstrated that an adjustment of the census would have very little effect on the distribution of Federal funds. The study in Appendix 15[140]

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[138]Estrada, page 24.

[139]Estrada, page 23.

[140]See appendix 15. Murray, Michael, "Census Adjustment and the Distribution of Federal Spending," U.S. Bureau of the Census, May, 1991, [hereafter Murray].

shows that less than one fifth of one percent of Federal funds would be reallocated as the result of an adjustment. Twenty-one or fewer states would receive additional funds from an adjustment. Fewer than half of all jurisdictions would be allocated additional funds as the result of an adjustment. As the study demonstrates, those jurisdictions that do benefit would receive on average only $56 in additional funds per "adjusted" person.

Thus, even if the claim that an adjustment would more accurately (and thus fairly) allocate federal funds were valid, the adjustment would not result in significant shifts of those funds.

Conclusion

Any decision will result in some level of disruption through legal challenges. On balance, the record indicates that a decision to adjust would likely be more disruptive than a decision not to adjust. A decision to adjust would clearly cause disruption in those States that have early redistricting deadlines. The assertion that persons are denied their rightful claims without an adjustment assumes that the distribution of the population is improved by an adjustment. Based on the evidence, this assumption is invalid. Thus, this guideline weighs in favor of a decision not to adjust.

Guideline Eight

The ability to articulate clearly the basis and implications of the decision whether or not to adjust shall be a factor in the decision. The general rationale for the decision will be clearly stated. The technical documentation

lying behind the decision shall be in keeping with professional standards of the statistical community.

Explanation

It is the responsibility of the government to have its critical decisions understood by its citizens. We recognize, however, that the degree to which a decision can be understood cannot alone dictate an important policy decision.

The decennial census is a public ceremony in which all usual residents of the United States are required to participate. If the census count were statistically adjusted, the rationale for that action must be clearly stated and should be understandable to the general public. If the decision were made not to adjust, the elements of that decision must also be clearly stated in an understandable way. It will be the responsibility of the Department of Commerce and the Bureau of the Census to articulate the general rationale and implications of the decision in a way that is understandable to the general public.

This does not require the Bureau or the Department to explain in detail to the general public the complex statistical operations or inferences that could lead to a decision to adjust. But, as with any significant change in statistical policy, the government has the duty to explain to the public, in terms that most can understand, the reason for the change. If the decision is not to adjust, (that is not to change) the public will be informed as well.

The last part of the guideline ensures that the methods, assumptions, computer programs, and data used to

prepare population estimates and adjustment factors will be fully documented.

The documentation will be sufficiently complete for an independent reviewer to reproduce the estimates. These standards apply to the post-enumeration survey estimates, the demographic analysis estimates, and the small area synthetic estimates.

Discussion

The general rationale for this decision is clearly stated in the first section of this report. The technical documentation underlying this decision is in keeping with the professional standards of the statistical community. Thus the Guideline has been satisfied.

However, the Guideline could have been met if the decision had been to adjust. The Census Bureau has done a laudable job of keeping the public informed of the progress of the post-enumeration survey and the progress towards the adjustment decision. There is no doubt that the process of adjustment is complex and the statistical details of the process are fully comprehended by only a few individuals. Although I am sympathetic with these arguments, this would not have been an impediment to an adjustment. The general rationale could have been clearly articulated. As Estrada notes, the public perception of the census "head count" is far removed from the actual process,[141] yet the general rationale for the census is well understood.

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[141]Estrada, page 24.

Conclusion

The requirements for this Guideline have been met. This Guideline does not weigh in favor of a decision either way since the requirements of this Guideline could have been fully met if the decision had been to adjust.

SECTION 3--SUMMARIES AND EVALUATIONS OF THE RECOMMENDATIONS OF THE SPECIAL ADVISORY PANEL

In this section I summarize the individual recommendations of each of the members of the Special Advisory Panel appointed to advise me on this decision, and the joint recommendation offered by Drs. Ericksen, Estrada, Tukey, and Wolter. After each summary I evaluate each recommendation.

Recommendation of Eugene P. Ericksen

Summary of the Recommendation

Ericksen recommends an adjustment. His argument relies substantially on a report co-authored by himself, Estrada, Tukey, and Wolter. He argues as follows: An adjustment will reduce the substantial error in the census and will correct for the differential undercount. The Bureau produced a demonstrably inaccurate census enumeration which can be fixed by means of PES estimates. PES estimates have been demonstrated to be both accurate and statistically reliable by evaluation studies of the 1990 decennial census. The racial differential undercount has

again been demonstrated in the census, and the PES can correct for this clear and important bias.[1]

On Guideline One, Ericksen reports from his jointly authored analysis and other analyses that it is clear the adjusted count has been shown to be more accurate than the original enumeration. In Ericksen's view there is little doubt that the original enumeration is inaccurate. He states that the Census Bureau reported 13 million erroneous enumerations, 19 million omissions, and a PES net undercount rate of 2.1%.[2]

Ericksen says the basic flaw of the original enumeration is that it uses a method "designed for the well educated, middle-class family with reliable mail service." He argues that the method does not work for "those who do not read well, who live doubled up in an apartment, who live in drug infested neighborhoods with high crime rates, and who only occasionally receive mail." The procedure had such well demonstrated flaws that the 4.7 million undercount, and the 4.4% demographically estimated differential, was not surprising.[3]

Ericksen states that the PES was successful. The interviewing quality was high, imputation was minimal, and the matching error was very small. The evaluation studies suggest that the total error in the PES was minor. Correlation bias suggested that the PES underestimated the

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[1]Ericksen, p. 1.

[2]Ericksen, p. 2.

[3]Ericksen, p. 2.

undercount, if anything. "The only reasonable conclusion is that the adjusted count is more accurate than the unadjusted count."[4]

On Guideline Two, Ericksen states that the adjusted data are consistent, complete, and of sufficient quality to be used for all purposes and at all levels for which census data are used. He cites the jointly authored report.[5]

On Guideline Three, Ericksen finds that "under any reasonable basis of comparison, the PES-adjusted enumeration is more accurate than the unadjusted enumeration."[6] The PES estimates are robust with respect to evaluation strata, and the effect of the PES biases on population shares is negligible. The estimates for the states whose Congressional delegation size might be changed by an adjustment are stable.

On Guideline Four, Ericksen says it is difficult to comment because of the lack of evidence. He interprets the available evidence from a National Opinion Research Center (NORC) study to suggest that most Americans would like to have the most accurate census and will trust the experts to make it so.[7]

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[4]Ericksen, p. 3.

[5]Ericksen, p. 3.

[6]Ericksen, p. 3.

[7]Ericksen, p. 3.

Ericksen has no expert opinion on Guideline Five but notes that Jefferson lamented the lack of accuracy in the first census.

On Guideline Six, Ericksen feels sufficient data are available to make the decision now. Sampling errors for local estimates are reasonably small, and the PES evaluation studies indicate that bias is small.

On Guideline Seven, Ericksen admits having little comment. As a scientist he feels it is better to use improved numbers when available than to rush ahead and make errors.

On Guideline Eight, Ericksen believes that the results can be explained, and the technical documentation is in keeping with professional standards.

Evaluation of Recommendation

I agree the census had an undercount. I also agree that the evaluation studies demonstrated that the PES was well done. I do not agree, however, that the PES has the ability to correct distributional error. The grounds for my disagreement have been documented in the discussion of Guideline One.

I agree that the adjusted count, if more accurate, has been shown to be more accurate in a numeric sense at the national level. I do not agree that the adjusted count is more accurate in the distributional sense at lower levels of disaggregation. In addition, the erroneous enumeration and

omission figures cited are Census Bureau estimates, which vary according to definition.[8]

The census used a variety of methods, including mail-out/mail-back, list enumerate, and list leave to fit different lifestyles. Class membership, education level, and reliability of mail service may explain some, but not all, of the census coverage problems. Recall that the personal enumeration censuses of 1940, 1950, and 1960 had even higher estimated undercounts. Thus, I disagree with Ericksen's notion that the census was "designed for the well educated, middle-class family with reliable mail service."

I do not agree that successful PES operations imply that the statistical manipulation required to go from its data to 4,830,514 blocks in order to produce a better count is a routine, automatic operation. I disagree that PES data, which are informative about the census, *can* be used to change the census in ways that make it distributionally more accurate.

I do not agree that merely because the Census Bureau can produce data that completely duplicate enumeration tables, that those numbers are of sufficient quality to be substituted for the census enumeration.

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[8]The numbers used by Ericksen are estimates derived from all P-sample misses (19,171,290) and all E-sample "Erroneous Inclusions/Unmatchable." (13,154,639) While defensible, this is but one extreme definition. For example, it does not take into account the role of Census imputations. The matter of estimating these two components is a matter of disagreement among professionals. See, for example, the discussion in a Memorandum from Howard Hogan to Pete(r) Bounpane entitled "Gross Census Errors," July 2, 1991, Bureau of the Census on these issues. See the discussion of this issue under Guideline One above.

I agree that the PES adjusted enumeration may be more accurate numerically. I do not agree that it is distributionally more accurate. While the estimates are robust for evaluation strata, there is considerable doubt cast on their homogeneity with respect to post-strata relative to states.[9]

I appreciate Ericksen's comments on Guidelines Four and Seven, although I do not agree with them. I agree with his comments on Guideline Eight. I agree with his comments on Guideline Six, except that sufficiency of data in Guideline Six has nothing to do with substantive outcome, as Ericksen's comments about the size of sampling error would seem to imply.

Recommendation of Leobardo F. Estrada

Summary of the Recommendation

Estrada recommends in favor of an adjustment. Estrada first spells out a general rationale for his decision which is followed by an exposition of his reasoning for each guideline. Estrada relies on the paper co-authored by Ericksen, Estrada, Tukey, and Wolter.

Estrada's general rationale begins with the observation that the 1990 census is sufficiently flawed to require adjustment. In particular, the undercount rate increased from 1980, the census omitted the largest number of persons ever, historical undercount differentials between

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[9]See P12, and the discussion of Guideline Three above.

blacks and non-blacks persisted, and the black non-black differential actually increased from 1980 to 1990.[10]

Estrada states that the observed pattern of undercount is consistent with prior censuses. The Census Bureau efforts to overcome the undercount in the enumeration failed for a variety of reasons relating both to the character of the population and to the nature of the census operation itself. "While the Census Bureau was able to improve its internal management systems, the national dynamics that comprise the U.S. became more complex."[11]

Estrada argues that the differential undercount was the real cause for concern. He asserts that it occurred due to a number of problems in census processes. Flaws in the census operation included inaccurate mailing lists, non-delivery of census forms, a lower than expected mail return rate, inadequate interviewer and enumerator staffing levels, delay in district office closings, enumerator errors, enumeration by last resort, missing data, the inclusion of 2 million non-data defined persons in the count, lack of non-English language forms, processing errors, lost forms, race and ethnicity misclassifications, geocoding errors, and duplicate records.[12] District offices in the largest cities with the most heterogeneous populations suffered more from these flaws than others resulting in more last resort, close-out and non-data defined enumerations among non-Hispanic blacks and Hispanics.

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[10]Estrada, page 2.

[11]Estrada, page 3.

[12]Estrada, pages 4-6.

Estrada states that the cumulative effect of all these problems is that the 1990 census needs adjustment.

Estrada describes the post-enumeration survey (PES) as a high quality process. He ascribes the high quality of the PES to, among other things, on-site listing of livable structures rather than reliance on mailing lists in sample blocks, experienced interviewers, a non-response rate of less than 1% and a proxy response rate of only 2.4%, relatively early interviewing to overcome the forgetting problem, successful tracking of the 8% of the PES who were movers, the successful evaluation program, and the fact of matching or resolving non-match cases for 98.3% of the 173,000 housing units surveyed.[13]

Estrada says that PES estimates of undercount follow known and expected patterns; *i.e.*, blacks higher than non-blacks, young males among minorities most often undercounted, the West division higher than other divisions, Hispanics highest rates of all. This attests to the "reasonableness" of PES undercount estimates and shows consistency with demographic analysis.[14]

Estrada claims the quality of the dual system estimates is sufficiently high to justify their use, according to the Hoaglin and Glickman sensitivity analysis among others.

Estrada says that adjustment methodologies improve the proportional distribution at all levels of census

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[13]Estrada, pages 6-8.

[14]Estrada, pages 8-9.

geography. He relies on the Tukey work and the work of other consultants that show that improvement at higher levels of geography improves shares at lower levels.

These conclusions by Estrada end the general rationale section of his recommendation The remainder of Estrada's recommendation focuses on each guideline.

On Guideline One, Estrada begins by reviewing the results of the Census Bureau evaluations of the PES, the so-called P-studies. The missing data studies (P1, P2 and P3) show that the rates of noninterview are low and the imputation for the primary populatior. items was also low. Alternative means of imputing missing data did not affect post-strata. A Special Advisory Panel (SAP) analysis shows that post-stratum shares are minimally affected by eight alternative ways of handling missing data, with one exception. Given the small number of imputations required for the PES, alternative methods would have small effects on the outcomes.

Estrada says that the matching error studies (P7 and P8) confirmed that the high quality of clerical matching and matching of movers was performed successfully.

Estrada writes that the correlation bias studies (P13, P14, and P17) show strong correlation bias in the PES. Although for some this casts doubt on the dual system estimates, for him there is another side to the coin--"the undercount would be underestimated, particularly for minority populations. Whether the underestimation of undercount caused by correlation bias balances the biases toward overestimation of the undercount caused by missing

data needs to be investigated, but the chances are they offset each other."[15]

Estrada states that other studies of data quality from the PES (P4, P5, P5A, and P6) show that the PES was not seriously impaired by problems of the quality in the reported census day addresses or fabrication.

Estrada says that those studies related to erroneous enumerations (P9, P9A, P10) show that erroneous enumerations were concentrated in particular evaluation post-strata. The census had higher rates of erroneous enumerations in minority areas and rural areas. Some significant changes would have occurred had matching of cases reported as erroneous enumerations been done by expert matching. On the census side there was a low error rate in matching, but more detailed analysis indicates that erroneous enumerations due to matching were more likely in two evaluation post-strata--non-minority areas outside the central city in the Northeast and West.[16]

Estrada claims that the study on late-late census enumerations (P18) shows that the addition of these data had an insignificant effect on the undercount rate. Similarly, balancing error was not a problem.

Estrada believes that the total error model (P16) indicates that errors introduced in the PES were small and tended to equalize racial differentials in the undercount.

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[15]Estrada, page 14.

[16]Estrada, page 16.

On Guideline Two, Estrada states that a strong argument can be made that the requirement for local area accuracy can be satisfied by showing that adjusted counts are an improvement on the average for the principal uses of census counts. He claims it is appropriate to judge the adjusted counts at higher levels of aggregation than the block.

Estrada acknowledges that the Census Bureau study on heterogeneity (P12) shows mixed results with respect to the homogeneity assumption with respect to poststrata. "The research 'flags' the need to be aware of State effects [overwhelming poststrata effects]."[17]

On Guideline Three, Estrada acknowledges that the Census Bureau study on coefficients of variation (P15) showed that estimates of variances and covariances for smoothed and unsmoothed adjustment factors were larger than expected. However, he cites the Hoaglin and Glickman study as demonstrating the robustness and stability of the dual system estimators under different statistical treatments.

On Guideline Four, Estrada argues that if the Secretary adjusts using the best tools available, the reputation of the Census Bureau will be enhanced. The census process must incorporate adjustment as its final step. Estrada interprets the National Opinion Research Center (NORC) poll as indicating that the decision to adjust is slightly more likely to improve participation in future Censuses.

On Guideline Five, Estrada states that the innovation of adjustment is in keeping with prior Census Bureau efforts

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[17]Estrada, page 19.

to meet the intent and spirit of the Constitution. The courts have already held that adjustment can be Constitutional.

On Guideline Six, Estrada states that "all the proposed studies have been completed, the data tables made available and the Census Bureau has had sufficient time to fulfill the concerns set out by [this guideline] in time for the Secretary of Commerce to make his decision."[18]

On Guideline Seven, Estrada states "Without denying the fact that there are State officials who feel imposed upon and elected officials (and potential challengers) who suffer from uncertainty as to when the boundaries of their districts will be 'fixed,' the actual consequences [of the census being adjusted and these figures not being available until July 15, 1991] are that a couple of Congressional seats will shift from one State to another; that delays will occur in redistricting, and that edges of many recently designed districts will have to be slightly modified to meet the one-person, one-vote requirements."[19]

Estrada says these disruptive consequences must be weighed against the fact that a census adjusted for deficiencies will provide a more equitable allocation of persons to each district, and a more equitable allocation for all other census purposes. The public good is better served by focussing on the potential benefits of adjusting the census to millions of persons rather than on the limited number of Congressmen and Congresswomen and legislative officials

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[18]Estrada, page 23.

[19]Estrada, page 23.

who will be affected by the July 15, 1991, decision to adjust the census and the subsequent release of adjusted numbers.[20]

On Guideline Eight, Estrada states there is an implicit assumption that the public understands the standard census methodology. However, their perception of what the census is--is far from the real census. Thus, both the real census and the reason for adjusting the census must be understood by the public. The public must understand the context of the PES in the census process. An informed public will accept the need to adjust if provided with concepts to understand the logic of the method.[21]

In conclusion, Estrada notes that the census has suffered from a persistent differential undercount. The evidence overwhelmingly demonstrates that the census count can be improved by adjustment. The PES adjustment factors have an advantage over demographic analysis in providing more specificity about the undercount. Adjusted counts will be more equitable and assure equal representation. Therefore, the Secretary of Commerce should adjust the census.

Evaluation of Recommendation

I do not agree that it follows that even were the 1990 census sufficiently flawed to require an adjustment, an adjustment is possible. The facts cited comparing 1980 and 1990 are a necessary, but not sufficient, grounds for considering an adjustment. A methodology must be

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[20]Estrada, page 23-24.

[21]Estrada, pages 24-25.

available that will achieve a successful distributional correction.

I agree that the differential undercount is regrettable, and a cause for serious concern. I do not agree with Estrada that the flaws cited in the census are tied directly to that undercount. I agree that no matter how the differential came about, one would want to fix it *if one could*.

I agree that the PES was successful. However, I do not agree that the PES estimates followed all expected patterns. For example, in the discussion of Guideline One, above, serious questions are raised about its success in finding black males, and its "over compensation" for older females. In fact, PES results are frequently inconsistent with demographic analysis.[22]

I believe that the Hoaglin and Glickman study can be interpreted to show not robustness, as Estrada says, but that it can be interpreted to show that thirteen different models produce thirteen different sets of adjusted counts. These counts may have been close to one another, but not necessarily be an improvement over the census. Furthermore, as I noted in the discussion of Guideline Two there are other sources of variation due to statistical modeling.

I do not agree that the conclusions reached with respect to the Panel correlation bias studies are as clear as Estrada asserts. As Special Advisory Panel member Wachter suggests, the undercount may be underestimated by correlation bias effects not because of differential misses, but

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[22]See the discussion of Guideline One above.

by differential erroneous enumeration rates when holding misses constant.[23]

I believe that Estrada's discussion of erroneous enumerations reaches the opposite conclusion from what the studies find: Differential erroneous enumeration rates by evaluation post-strata are a cause of concern, because they leave open the real possibility of differences between processing offices in how well the PES was carried out.

I agree that the total error model is experimental, but I disagree that the expression "total" is appropriate. Not all errors are included in it, only those errors that could be estimated on the basis of the PES. While the study of total error is encouraging, it is not yet dispositive with respect to the utility of the model.

Estrada acknowledges that P12 shows mixed results with respect to heterogeneity of post-strata. Thus, his assertion that requirements for local area accuracy are satisfied by "average improvement," and that only higher than block levels of aggregation need be considered, seems to me to contradict his acknowledging that local area accuracy needs to be satisfied. In fact, heterogeneity at the block level would mean that Guideline Two has not been satisfied.

As noted earlier, I believe that the Hoaglin and Glickman study can be interpreted as demonstrating a clear lack of robustness: Since accuracy at the block level is the goal, a process that allows thirteen different models to produce thirteen different estimates that differ only a little

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[23]Wachter, pages 12-13.

from one another, is not adequate. Differing a little at the high level of aggregation of the Hoaglin and Glickman work may mean differing dramatically at the block level.

I do not agree with Estrada's comments on Guideline Seven. The adjustment, as envisioned, will, in fact, not provide a more equitable allocation of persons to districts as he assumes. In my opinion, the lack of distributional accuracy is precisely why the adjustment is flawed as a correction for the census counts.

I do not agree that adjusted counts will be more equitable as Estrada claims in his discussion of Guideline Eight. In fact, they will not be more equitable distributionally, which is the criterion for determining whether an adjustment would improve the accuracy of the counts.

Recommendation of William Kruskal

Summary of Recommendation

Kruskal recommends against an adjustment. He uses the word "modification" rather than adjustment since the latter term suggests to him that "we really know how to improve the Census enumeration."[24] The primary reason for recommending against adjustment is that "we do not know with any confidence how to make such improvements . . . and we will not know in a relevant time scale."[25] Although "the proposed modifications are clever and technically

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[24]Kruskal, page 1.

[25]Kruskal, page 1.

interesting, the method turns on highly specialized assumptions and we simply do not know how robust the output results are against realistic errors in those assumptions."[26] The proposed modifications are complex, impossible to explain clearly for a general audience and their use is "likely to increase already existing apprehensions about manipulation and big brotherism in Washington."[27] The modified estimates might well introduce more error than they clear up, without anyone being aware of such an imbalance.

On Guideline One, Kruskal contends that there is no conclusive evidence that the modification removes more error than it introduces, and does not expect any convincing arguments anytime soon. The major gap in assessing comparative accuracy is the uncertainty about the "capture-recapture" model.[28] The implicit assumption of uniform capture probability is the most troublesome. Knowledge about the degree of output error caused by the non-factuality of this assumption "is just what we do not have, indeed cannot have, for the post-enumeration process."[29]

Later Kruskal notes that Guideline One calls for the highest professional judgment from the Census Bureau. "The highest level of professional judgment requires vigorous argument and discussion not only within the Bureau

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[26]Kruskal, page 1.

[27]Kruskal, page 1.

[28]Kruskal, page 2.

[29]Kruskal, page 3.

but in groups made up both of Bureau and outside statisticians and others. That vigorous and public discussion we have not had in nearly adequate amount."[30]

On Guideline Two, Kruskal's only comment is that synthetic adjustment is based on a simplifying assumption that is known to be wrong, which in turn throws great weight on the calculations of stability, given reasonable error structures.[31]

On Guideline Three, Kruskal's impression is that "choice of the so-called smoothing procedures was profoundly based on post-enumeration survey (PES) results,"[32] which is not in keeping with the guideline. He questions whether "that in *major* respects the choice of procedure was made before the PES results were in hand," but time did not permit a full investigation on his part.

On Guideline Four, Kruskal feels the extraordinarily complicated procedures will undercut public confidence in the census. On Guideline Five, Kruskal has no comment. On Guideline Six, Kruskal believes that "timely data and analysis are not really at hand."[33] On Guideline Seven, Kruskal does not see how "this cuts in the present context."[34] On Guideline Eight, public explanation will be difficult

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[30]Kruskal, page 5.

[31]Kruskal, page 3.

[32]Kruskal, page 4.

[33]Kruskal, page 5.

[34]Kruskal, page 5.

because of the complexity and the choice of one of many such methods available.

Kruskal notes that the Guidelines "tilt against modification," but "that is hardly novel."[35]

Without resting his views solely on the guidelines, and instead on his "partly formulated and internalized professional criteria, along with [his] internalized civic standards,"[36] Kruskal still recommends against an adjustment. He expresses concern about the large numbers of estimated counts and the inherent problem of putting together the millions of estimated differences between the count and the adjustment. He closes by noting that modifications that increase counts can, in fact, harm, by moving the proportions of the population in a given area in the wrong direction.

Evaluation of Recommendation

I agree that the census modifications lack robustness. Thus, Kruskal does not interpret the Hoaglin and Glickman studies as do plaintiffs' panel members. He recognizes that the adjustment may introduce more error than they correct without anyone knowing it.

I agree with Kruskal's criticism of the "capture-recapture" model upon which the DSE is based. He notes, in particular, that its assumption of uniform capture probability is most troublesome.

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[35]Kruskal, page 5.

[36]Kruskal, page 6.

I agree with Kruskal's belief that there has not been an adequate vigorous and public discussion of the merits of adjustment. However, I disagree with his statement that the lack of such a discussion means we are not able to determine whether Guideline One is adequately met.

I disagree with Kruskal that, in terms of Guideline Three, there was no prespecification. He asserts that smoothing procedures were based on PES results. His comments implies a standard that would, in Guideline Three terms, preclude ever meeting prespecification requirements.

I agree with his comment that increasing counts can move proportions of the population in a given area in the wrong direction. That comment means that he, too, is concerned with the problem of distributive accuracy, and that he shares a concern about whether the proposed procedures deal with it adequately.

Recommendation of Michael McGehee

Summary of Recommendation

McGehee strongly recommend[s] that no adjustment be made to the census. There is no compelling evidence that suggests that the PES [post-enumeration survey] will provide estimates that are any closer to the true population totals for the eight million blocks in the United States. Indeed. there is significant evidence to suggest that adjustment will move the population of many blocks further away from their true populations.[37]

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[37]McGehee, page 6, emphasis in the original.

Persons have always been missed in the census for a variety of reasons. Statistical adjustment is the most recent proposal to address the situation.[38]

McGehee states that adjustment numbers are estimates just like census counts: there is no way to determine which is closer to the true population, other than assumption and judgment. The evaluations of PES data "rested on pre-conceived assumptions of how the data would appear."[39] The results often fell outside the lim its predicted from these assumptions. Rather than accepting the conclusion that the process is flawed, the assumptions were modified. He has no confidence in this reasoning. He refers to the problem in computing margins of error (variances) for local estimates as an example of this problem. "It is a strong indictment of the entire process, however, when evaluation procedures are not clearly understood by those using them * * *. The entire process has tended to produce more, rather than less, uncertainty."[40]

McGehee gives, as an example of the uncertainty created, the large difference in production matching effectiveness rates between Albany and Kansas City (87.20% v. 93.49%). Why this discrepancy exists is unknown and "no documented evidence can be presented which clearly explains this problem."[41] Adjustment proponents will argue that in the aggregate these problems are small and thus "the

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[38]McGehee, page 2.

[39]McGehee, page 3.

[40]McGehee, page 4.

[41]McGehee, page 4.

differences at lower levels should be overlocked because they become insignificant at the aggregate level."[42] McGehee disagrees, pointing to Guideline Two requiring accuracny across all jurisdictional levels. Furthermore, variation at the aggregate level, McGehee contends, is discounted by proponents by modifying the assumptions upon which the conclusions have been based.

"Decisions made during the DSE process, and the assumptions on which they stand, dramatically alter the adjustment results. A politically 'better' count cannot be defended if it is shown that the assumptions on which it rests are changeable."[43] Because of the widespread use of census figures, they must be defensible. The Bureau has maintained public confidence in its numbers over the years by "its meticulous approach to detail and its dogged adherence to maintaing the quality of Bureau data as the true standard."[44] Adjustment will undermine the public's confidnece in this track record. A decision to adjust should be treated as political, and be forced to undergo the same Congresional scrutiny as other such decisions.

McGehee continues his argument by discussing the capture-recapture methodology. He uses an analogy to compare the PES to counting bears in a game preserve. He notes that the heterogeneity in game wardens' background and abilities, in the types of bears and their physical characteristics and in the terrain will lead to differences in

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[42]McGehee, page 5.

[43]McGehee, page 5.

[44]McGehee, page 6.

how well the bears are counted. In similar ways, the enumerators' characteristics, the characteristics of the population the enumerator is counting and the environment in which the enumerator is working will all have effects on the outcome of the PES. These problems are compounded by the fact that PES records must be matched back to the census and the ability of matchers may be heterogeneous.[45] To identify tghe weight given to each of these variables, regression models are used to determine their individual effect. How these regression models are specified in the PES process is constantly changing. How to combiene these variables into a larger number and how to cmpare various strata are issues of judgment on which individuals may differ.[46]

McGehee says that comparisons of data to the "correct" or "true" population are often made. The "correct" population is derived from a series of assumptions and thus results are simply theories. After reviewing the data, it is clear that the proposed adjustment does not meet the criterion of being usable across all jurisdictional levels nor is it robust at local levels to reasonable alternatives. The idea of using the PES to adjust the census is so complicated and so subjective, that no reasonable person can agree that it should be contemplated or that the process will be explicable to the general public.[47]

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[45]McGehee, pages 8-10.

[46]McGehee, page 11.

[47]McGehee, page 12.

McGehee next turns to the issue of comparing the accuracy of the PES to the Census. Matching PES and census records is the key to assessing the relative success of the PES and the census in counting people. His "analysis shows that the PES fails to demonstrate a 'better' record of counting people than the Census. Indeed in many instances it cannot demonstrate that it did *as well* as the Census."[48] In support of his assertion McGehee presents a cross tabulation of census match codes by race and ethnic origin. He also does so for the PES. Although "time does not permit extensive analysis of thid data,"[49] he does note that twice as many Hispanics in the census left the race question blank as in the PES. More Hispanics identifie4d themselves in the category "other" in the PES than in the census. "On a superficial basis, the results raise very significant questions whether adjustment will, in fact, yield greater accuracy than the census."[50]

McGehee states that the rationale for using the PES to correct the differential undercount rests on the assumption that as the black population increases in each block cluster, the PES will do a better job than the census in counting people.[51] It is appropriate then to compare the "best" and "worst" census and PES numbers within each block cluster and see how these comparisons change as the concentration of blacks increase over clusters.

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[48]McGehee, page 14.

[49]McGehee, page 19.

[50]McGehee, page 19.

[51]McGehee, page 20.

McGehee argues that since errors occur in both the census enumeration and the PES survey, judgments had to be made as to whether it was correct to include them. These judgments are critical in determining the success or failure of the PES or the census. In those cases where judgments were made, one can get a range of estimates of quality by assuming that all judgments should have gone in favor of omission and, alternatively, all judgments should have gone in favor of inclusion.[52] Best and worst confidence level scenarios for the census and the PES in each block cluster are carried out. These comparisons are displayed by ranking the results in order of the proportion of blacks in the cluster, since research indicates "that as the percentage of black population within a cluster increases, the effectiveness of census coverage decreases."[53]

McGehee uses six graphs to present these results. "When comparing the best census scenario with the worst PES scenario one sees that the census does a dramatically better job of correctly counting people than the PES. . . . What is surprising, however, is the potentially dramatic performance shown by the census in those clusters where the black population is between 50% and 75%. Even more surprising is the very close correlation between the census and the PES in clusters where the black population is greater than 80%. In fact, the Census has a higher confidence level than the PES in those clusters where the black population is between 80% and 85%. This flies in the face--and graphically demonstrates the fallacy--of the argument put

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[52]McGehee, page 21.

[53]McGehee, page 26.

forward by the proponents of adjustment."[54] The PES does not necessarily outperform the census. Even if one accepts the midpoint between the best and worst PES results, the census exceeds this level and the PES does not outperform the census in clusters containing a large number of blacks.[55]

McGehee then turns to the guidelines. In his discussion of Guideline One, he finds the entire concept of adjustment on "the outer limits of statistical research."[56] The assumptions underlying the evaluations of the PES are so arbitrary and fluid that little weight can be attached to their assessments of PES quality. Therefore, Guideline One cannot be met since one cannot prove that the PES is better than the census.

On Guideline Two, he notes that variances between processing offices and evaluation strata are outside expected levels and at the district office level there was such variation it could not be reconciled. Adjusted numbers are inconsistent at the State, city, and subcounty level and suffer from serious quality concerns.[57]

On Guideline Three, McGehee asserts that the adjusted counts have not been shown to be more accurate than the census enumeration. The determination of quality is dependent on many assumptions and judgments.

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[54]McGehee, page 28.

[55]McGehee, page 29.

[56]McGehee, page 31.

[57]McGehee, page 32.

McGehee says that the manipulation of assumptions in evaluation studies undermines confidence in all ongoing statistical data collection and therefore Guideline Four cannot be met.[58]

McGehee claims there remain legality questions about adjustment that need to be answered with respect to Guideline Five. On Guideline Six, McGehee states that sufficient data are available to suggest that the PES was flawed and the analysis of the data is insufficient to justify a decision to adjust the census.[59]

On Guideline Seven, McGehee finds that the mere fact of a possible adjustment has caused consternation and difficulties in state legislatures. The lack of consensus on the desirability and statistical feasibility of adjustment will result in extensive legal battles.[60]

Finally on Guideline Eight, McGehee asserts that the entire process is so complicated and difficult to understand, even by professionals, that a general rationale cannot be clearly justified. To the degree that the process is explained successfully people will become aware of the kind of manipulations underlying it and the integrity of the statistical process will be forever compromised. Adjustment is to correct an inequity, which is not a statistical problem but a

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[58]McGehee, page 33.

[59]McGehee, page 33.

[60]McGehee, page 34.

political and societal problem that should be dealt with by the Congress.[61]

Evaluation of Recommendation

I agree with McGehee that the results of the PES fell outside expectations. The error variance around local estimates are an example of this problem.

I agree with McGehee's citing large differences in production matching effectiveness between processing offices as indicators of uncertainty rampant in the PES data. However, evaluation studies of the PES have not found the kind of systematic effect alleged.

I disagree that the link between the Bureau's credibility and its aversion to schemes that tend to devalue the census itself is a reason for avoiding adjustment.

I agree with McGehee's criticisms of the capture-recapture methodology. He raise issues not brought out elsewhere that cast doubt on its validity for use on human problems. I agree with his notion that characteristics of interviewer, interviewee, and setting interact to affect the quality of information, and find McGehee to persuasively elaborate the idea. I believe that McGehee's ideas support criticisms of Kruskal and others that the method is flawed fundamentally.

I disagree that if an adjustment were made it would not be explainable to the public. Since the decision not to

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[61]McGehee, page 35.

adjust is just as complicated, this statement does not seem to have merit as an argument against adjustment.

Although I concluded that an adjustment would degrade the quality of the population distribution as compared to the census, I do not agree with McGehee's explanation of why the PES did not do as well as the census. He presents an analysis showing that, in a sample of block clusters, as the percentage of blacks within a cluster increases, the census actually performs better than expected. McGehee claims that this analysis casts serious doubt on the argument that *ipso facto* a PES based adjustment will necessarily reduce the differential undercount of blacks. I find his argument at best anecdotal and not compelling.

I agree with McGehee's conclusions that, on the basis of his analyses, arguments for adjustment based on Guidelines One, Two, Three, and Six are not adequate: The census remains more accurate than the PES; adjusted numbers are inconsistent at different levels of geography, and the quality of the PES is too dependent on assumptions, not facts and analysis.

McGehee argues on Guideline Seven that disruption is already occurring. This argument lacks support. He cites no evidence that adjusting or not adjusting will differentially contribute to disruption. Thus, I find that his arguments that this Guideline argues against adjusting are not relevant.

I disagree with his belief that the technicalities cannot be explained. Rather, I note that the process has been open, the Bureau has gone to great lengths to document its activities, so that there was no lack of ability to explain adjustment.

Recommendation of V. Lance Tarrance, Jr.

Summary of Recommendation

Tarrance recommends against an adjustment. He has chosen to concentrate on the public policy implications of a decision, not only because it is his area of expertise but also because he is "convinced that the impact of changes to the enumeration totals on the operations of our government--at the federal, state and local levels--would be disastrous."[62] Tarrance's lengthy introductory remarks are followed by a discussion of the guidelines.

Tarrance states that the perception that if the Bureau discovers how many persons it missed it should be an easy task to correct census results is incorrect. In fact, there is no consensus on how to fix the counts among statisticians or other experts. Two Gallup polls--March 1990 and April 1991--show no consensus on including estimates of missed persons in the count. Whites were evenly split; non-whites preferred a synthetic adjustment.[63]

Tarrance says that more important than the statistical quality of the numbers is the public policy aspects of an adjustment. These include "the paralyzing difficulties that changing the numbers will cause in accomplishing redistricting . . . for all levels of the electoral system; the damaging perceptions that will be given to the public about the two different sets of numbers from the census; the troubling uncertainties surrounding even statistically-

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[62]Tarrance, page 1.

[63]Tarrance, page 2 and Appendices.

acceptable numbers . . ."[64] Such policy difficulties should not be dismissed as many proponents of adjustment have done.

Tarrance asserts that lost in the debate fostered by adjustment advocates are the following points of decisive importance: (1) The adjustment process is complex, not well understood, without precedent and evaluations of it are judgmental; (2) synthetic estimates below the State level will never be more accurate than census counts; (3) the deadline of July 15, 1991, has not allowed enough time for adequate evaluation of the adjustment process or its product; (4) two sets of numbers may create "chaos" for the 1992 elections; (5) the trust in census confidentiality and the belief in the need to cooperate with the census will be further eroded; (6) resources may be denied to future census activities because "adjustment will take care of all problems" will be the expedient prevailing attitude; and (7) accepting adjustment will invite "'inside manipulation' of numbers for political purposes."[65]

Tarrance says that "The adjustment process being used can produce an array of different results depending on the choice of assumptions and/or statistical methods employed. . . ."[66] Thus, the issue is not technical, but judgmental, as the decision calls for an assesment of the consequences of a decision. Whatever the decision, litigation will ensue, but a decision against adjustment "may

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[64]Tarrance, pages 2-3.

[65]Tarrance, pages 4-5.

[66]Tarrance, page 6.

be the beginning of a more reasoned look at the problem."[67] The Constitution says Congress shall determine how the census is to be conducted; therefore Congress should settle this issue, if at all possible, rather than the courts.

Tarrance quotes a statement made by co-chair Ericksen in 1980: "The undercount adjustment procedure needs to be statistically sound and politically credible," and goes on to state that the controversy has increased, in fact, and Ericksen's 1980 position is even more compelling today. Given the confusion and possibly paralyzing effects of adjustment, the best solution is not to adjust the census today, but to consider the proposal to adjust intercensal estimates as is done in Australia, Finland, and Spain.

On Guideline One, Tarrance first notes that statistical sampling only produces accurate results when sample sizes are sufficiently large, and for small jurisdictions this is simply not the case. Some small area counts will be made less accurate by an adjustment and the question is how we deal with such areas. There are a host of questions about tradeoffs among communities in accuracy that remain unanswered.

Furthermore, he points out that accuracy is a point of fundamental definitional differences between law and statistics: law needs certainty, statistics accepts a range of uncertainty about numbers it still considers accurate. "Any court settlement directing adjustment will *necessarily* require the arbitrary choice of numbers which have been derived from methods that statisticians would ordinarily hedge about. . . . It is paradoxical that those same interests who

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[67]Tarrance, page 7.

are faulting the Bureau of the Census for not having counted all persons are at the same time putting inordinate trust in that same agency to transcend the limits of statistical 'estimating!'"[68]

Tarrance argues that:

The important fact that is buried in the mass of rhetoric about the need to correct inequities resulting from undercounting is that the numbers will undoubtedly be less accurate for many areas below the state level. The reality is that the adjustment process will not find those persons who were missed by the original enumeration and include them where they were not counted before. . . . Some correctly counted blocks could have persons added to their count; some correctly counted blocks could have persons deleted from the census count, and incorrectly counted blocks might not have any changes made to their numbers.[69] In addition, the post-enumeration survey (PES) is not able to handle all forms of counting errors with equal adequacy. Thus, misallocation can still occur even with adjusted numbers. Ultimately, "the final numbers are chosen from a range of possibilities that are dependent upon the choice of assumptions; there is a great deal of 'inside' judgment involved, and although [he has] no reason to doubt the experts at the Bureau of the Census who ahve had to make the hard choices, it is still troublesome that there is an

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[68]Tarrance, page 13.

[69]Tarrance, page 13, emphasis in the original.

opportunity for different results to be obtained by the use of different methods or assumptions."[70]

On Guideline Two, Tarrance states that a lack of usability for redistricting is a major deterrent to proceeding with adjustment, because of the conflicts having two sets of numbers will generate. "The realities of redistricting at the state and local level, combined with the possibilities for endless litigation, are such that it would be naive to believe that synthetic numbers will be usable . . . for the purposes of redistricting and reapportionment."[71] With two sets of numbers, redistricting plans will likely end up in court and the likelihood of "chaos" for the 1992 elections seems ever more probable.

On Guideline Three, Tarrance is most troubled by "the acknowledged fact that different methods using different assumptions produce different results."[72] As an example he notes that small numerical differences lead to large consequences in reappportionment and redistricting. "It is all too obvious that the procedures being used will not produce robust numbers and that it would be possible to obtain an array of population counts which could have very different effects upon apportionment."[73]

The requirement for pre-specification in Guideline Three concerns Tarrance, as some procedures were

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[70]Tarrance, page 16, emphasis in the original.

[71]Tarrance, page 18.

[72]Tarrance, page 19.

[73]Tarrance, page 19.

prespecified and some were not. In particular the decision not to combine demographic analysis with the PES was made by staff, in stream. This is an example of an attitude of "if the numbers don't come out the way we think they should, we can change plans" which is "diametrically opposed to what good government policy should allow. Furthermore it is clear that the adjustment process is a statistical operation which has never been done before and there are many last-minute decisions being made."[74] Tarrance expressed uneasiness that "special interest pressure to adjust was pushing an incompletely researched or insufficiently tested statistical operation to a very shaky end".[75]

On Guideline Four, Tarrance states that a decision to adjust would have a far-reaching impact on future census efforts. Future censuses might be adversely affected as the Congress might well cut census funds, using the logic that an adjustment will fix the count anyway. Mayors and other local officials would question the necessity for their efforts on behalf of the census. The adjustment controversy might very well erode the already tenuous confidence of the public in the Census Bureau. The controversy surrounding the count should lead to imaginative ways to take the census in 2000, such as rolling samples, the "bare bones" head count, *etc.*; and legislative proposals immediately after the adjustment decision.

On Guideline Five, Tarrance states that Congress should determine how the census is to be conducted as

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[74]Tarrance, page 21.

[75]Tarrance, page 22.

required by the Constitution. Congress could also direct program solutions to resource allocation inequities.

On Guideline Six, Tarrance is convinced that the entire process has been rushed in an attempt to meet an arbitrary deadline. There has not been enough time for the evaluations. Given the controversy and that a general consensus has not developed, the adjustment should not be done without "the most exhaustive study and analysis of the data," which there has not been enough time to do.[76]

On Guideline Seven, Tarrance notes that the Special Advisory Panel met with representatives of the National Conference of State Legislatures. Technicians who must do the redistricting believe that they will be "paralyzed" by the "endless litigation" two sets of numbers will provoke if the census is adjusted,[77] although the very existence of two sets of numbers may be problematic. An adjustment would be most threatening to the creation of redrawn electoral districts for the 1992 elections.

Adjustment, according to Tarrance, will set a precedent for adjusting future censuses. He notes that one person miscounted in the PES represents from 500 to 1,000 persons that would be added or subtracted to develop adjusted numbers. The opportunity for, or perception of, manipulation to achieve desired ends will remain, but once adjustment is routine and not subjected to the scrutiny that it is now, the rigor of public examination to assure that

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[76]Tarrance, page 27.

[77]Tarrance, page 28.

manipulation does not occur will wane, and the risk, therefore increase.[78]

On Guideline Eight, Tarrance states that few people, even expert statisticians, really understand the process being used. He offers several examples of procedures and results of adjustment that are not well understood and states that it is impossible to articulate the complicated statistical procedures to the average person.

Evaluation of Recommendation

I disagree with the implication of Tarrance's discussion of public policy considerations that results of polls should play a substantial role for or against adjustment. I also disagree that if there is consensus that a particular adjustment would improve the counts and consensus that the adjusted counts are better than the enumeration, then an adjustment could be done based solely on that consideration.

I agree with Tarrance's point that there is support for not adjusting because of disruptive consequences for redistricting efforts.

I agree with Tarrance that the seven points of importance he cites, *i.e.*, complexity, lack of accuracy of synthetic estimates, inadequate time for evaluation, two sets of numbers leading to "chaos" for 1992, erosion of trust in census confidentiality, adverse consequences for funding future censuses, and the danger of inside manipulation, are valid expressions of concerns affecting the application of Guidelines One, Three, Six, Seven, and Eight.

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[78]Tarrance, page 29.

I agree with Tarrance's discussions of lack of robustness which occur throughout the discussion. The point is made by him that judgment plays a substantial role in the choice of adjustment procedures. This is a flaw in the adjustment process pointed out in the discussion of Guideline Three, above.

I agree that Guideline One's requirements for accuracy are not met. The problem of misallocating people--even if one counts them correctly at a "higher" geographic level, is raised and documented. I agree that the arbitrariness of outcomes depending upon choice of assumptions is a fundamental weakness of adjustment.

I disagree that two sets of numbers will cause sufficient chaos to make either set not "usable" in Guideline Two terms. This is not the definition of usability intended by the guidelines. In fact, the effects of the numbers, if accurate and usable to the block level, should not play a role in the adjustment decision with respect to Guideline Two. This argument does not raise a bar to adjustment.

I agree that prespecification may be a cause for concern. However, because the prespecifications, such as the decision not to combine demographic analysis and PES results, were professionally done by career Census Bureau staff, I find that they impose no bar to adjustment according to this guideline.

I agree with Tarrance's assertion that adjustment will have an adverse effect on future censuses.

I do not agree that there has not been enough time for the PES evaluations.

I agree with the evidence as cited, including a meeting by the SAP members with representatives of the National Conference of State Legislatures, supporting, anecdotally, a prediction of endless litigation to be engendered by two sets of numbers, if an adjustment is made. I agree that there will be an increasing risk of future manipulation of the counts through adjustments if the precedent is set. This point is acknowledged in the discussion of Guideline Seven, above.

I disagree that the adjustment cannot be explained adequately, should it occur. I believe there is sufficient documentation to do so. I disagree with Tarrance's interpretation of the role of Guideline Eight on this matter.

Recommendation of John W. Tukey

Summary of the Recommendation

Tukey recommends an adjustment. He relies on the same report submitted by and coauthored by Ericksen *et al.* He argues that each and every one of the technical Guidelines are supportive of adjustment and the key Guidelines One and Three are indicative of an adjustment.[79] Tukey addresses the guidelines in the order given here.

On Guideline Four, Tukey states that a decision to adjust will enhance the Bureau's reputation and facilitate future operations, while a decision not to adjust may hinder future census efforts.

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[79]Tukey, page 1.

Tukey states that the questions raised in Guideline Five have been before the courts several times, and all decisions rendered permit adjustment.

On Guideline Seven, Tukey states that the Guideline must refer to aspects of orderly transfer of political representation that could not be anticipated in March 1990. There are no such aspects.

On Guideline Eight, Tukey states that the Guideline can easily be met. The technical documentation lying behind the adjustment decision is in keeping with the professional standards of the statistical community.

On Guideline One, in Tukey's professional judgment, the adjustments based on the post-enumeration survey (PES) have been prepared based on the highest professional judgment, and are more accurate, both as to numbers and as to shares, than the raw original enumeration

On Guideline Two, Tukey notes that, since the Bureau is preparing consistent and complete counts down to the block level, there is "no bar to adjustment."[80]

On Guideline Three, Tukey says that the Bureau has stuck to prespecified procedures. Dr. Robert Fay and consultants Drs. David Hoaglin and Mark Glickman have done a series of studies testing different statistical models that agree with one another and have proved to be good.

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[80]Tukey, page 3.

On Guideline Six, Tukey states there should be no questions raised about nonadjustment because of inadequate data by 15 July 1991.

Tukey ends with a post-script that notes that the existence of sensitivity of adjustment to reasonable choices should be no bar to adjustment, as long as it is small. The single prespecified procedure produces small sampling errors in comparison with post-stratum to post-stratum differences in adjustment factors to make it clear that adjustment provides smaller combined error than non-adjustment.

Evaluation of Recommendation

I disagree with the assertion that a decision to adjust will enhance the Bureau's reputation or facilitate future census efforts. In fact, other SAP members assert the opposite.[81]

I agree that Guideline Five is not a bar to a decision to adjust.

Tukey's interpretation of Guideline Seven, while unique, would not change the role this Guideline plays in the adjustment decision.

I agree Guideline Eight can be met.

I disagree that the analysis of Guideline One indicates that the Guideline has been met with respect to shares. Since the adjustment must clearly be shown to be superior to the census, controversy over this very important role played

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[81]McGehee, page 6; Tarrance, pages 4-5.

by census numbers indicates that the Guideline has, in fact, not been met.[82]

I disagree with Tukey's argument that Guideline Three has been met. In particular, I disagree with his interpretation of the Hoaglin and Glickman study, which he says supports the homogeneity assumption. As noted above, it can be used to support a conclusion that variance is a serious problem with the synthetic estimation model.

I agree that Guideline Six can be met.

I disagree that small differences between alternate sets of adjusted figures are no bar to adjustment, given the requirements to adjust to the block level with distributive accuracy.

Recommendation of Kenneth W. Wachter

Summary of the Recommendation

Wachter recommends against an adjustment. He "conclude[s] that the requirements for accuracy, state and local usability, and robustness articulated in Guidelines One, Two, and Three are not met by the adjusted counts. The broader considerations in Guidelines Four through Eight also, on balance, do not favor a decision to adjust. [He] therefore recommend[s] against adjustment of the 1990 U.S. Census counts."[83]

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[82]See the discussion in Guideline One above.

[83]Wachter, page 2 of cover letter.

On Guideline One, Wachter concludes that the adjusted counts are not satisfactory. Although:

> evidence indicates that the adjusted counts are more accurate at the national level, the relative sizes given by adjusted counts are probably less accurate for a number of [S]tates and surely less accurate for a substantial fraction, possibly a majority, of local areas for which [c]ensus counts are to be used."[84]

As a preface to detailed sections on Guideline One, Wachter makes several pages of general observations:

> The adjustment of a census is difficult as it is a matter of changing the counts for 6.8 million blocks. A post-enumeration survey (PES)-like survey is usually used to generalize up from sample totals to population totals; for such a use the absolute size of the sample rather than the fraction surveyed would limit the accuracy that could be achieved. The PES is used by the census to generalize down, which is a much more demanding process.
>
> Three things must happen for the PES to be successful. The PES operation must be good, the people missed in the Census have to be reached by the PES, and the reasons why people are missed must be knowable so that one can extrapolate from the people and places analyzed to all the rest, for the PES to improve the census enumeration. The first has happened, the second has not, and the third is in doubt.[85]

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[84]Wachter, page 1, emphasis in the original.

[85]Wachter, pages 1-2.

The quality of the PES is high. There are problems and limitations but no disasters. Thus the first criterion is met.

A substantial portion of persons missed, net, by the census were not within reach of the PES. Discrepancies between estimates of national undercount between the PES and demographic analysis by age and sex for blacks and non-blacks cannot be explained away by plausible allowances for uncertainty. Half the black males who are missed, net, in the census are being missed, net, in the PES. There is no direct information on the distribution of these people from place to place.

As to the third criterion, the answers are not yet clear-cut. There is insufficient homogeneity at different levels of disaggregation for post stratum for the adjusted numbers to be usable. Erroneous enumerations are numerous and prominent in the adjustment picture. Block level data and district office data do not support the assumption of homogeneity.

Different smoothing procedures should lead to similar answers with respect to adjusted versus enumeration counts, but they do not: they lead to markedly different answers.[86]

Combining census and PES data produces results that are better than either alone only if we know enough about the precision and accuracy of each part. This is an empirical, not an *a priori*, question.

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[86]Wachter, page 3.

His personal experience with census enumerators and PES enumerators suggests that, contrary to common wisdom, census enumerators may very well have done a better job than PES enumerators in a significant class and number of cases.

[He] do[es] not believe that any highly aggregated index or loss function is appropriate for summing up overall accurary. It is informative to understand how much the outcomes of calculations with different versions of such aggregated indices differ. But the choice among them is not a scientific choice. Each such index involves implicit value judgments about different sorts of error. For example, each index determines whether a few large errors are more serious than a great many smaller errors. *Whether we agree with a particular tradeoff is a matter of personal and political values. It should not be disguised as science.*[87]

The census is the source of small-area data, so accuracy at that level has a special claim although some sensible balance of concern and perspective for level of detail is required.

In the first section devoted to Guideline One, Wachter considers national discrepancies between the PES and demographic analysis. There is a national undercount, although Wachter takes issue with the uncertainty intervals about the point estimates of the undercount. There is also credible evidence of a differential undercount. Although the evidence from the demographic analysis and the PES agree as to the existence of broad differentials, "the evidence as to the pattern by age and sex for blacks and non-blacks does

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[87]Wachter, page 5, emphasis in the original.

not agree."[88] According to the demographic analysis, a high undercount rate for black adult males, ages 20-64 exists. This does not occur in the PES which means that "*a large portion of the people probably missed by the Census were also missed by the extrapolation from the PES that produced the adjusted counts.*" He calls these people "unreachable."[89]

Wachter estimates the numbers of unreachable people to be large, perhaps half-a-million. Since nothing is known about their location, the huge numbers of "unreachable" people mean relative population sizes based on adjusted counts cannot be shown to be more accurate than those based on census counts at any subnational level.[90]

Wachter then turns to patterns in the estimates of net undercounts for post-strata. The patterns of adjustment factors for the 1392 post-stratum groups show regular patterns at higher levels of aggregation, but unexpected complexity when examined stratum by stratum, suggesting heterogeneity where there should be homogeneity. Analysis "for aggregates mask a large amount of diversity within groups, and the story of census coverage, at a level of fine detail, is more complicated than one would hope."[91]

Wachter then turns to the proximate determinants of net undercount. He finds that "erroneous enumerations account for a large portion of the variations in net

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[88]Wachter, page 9.

[89]Wachter, page 7, emphasis in the original.

[90]Wachter, page 9.

[91]Wachter, page 10.

undercounts across areas and post-strata."[92] Erroneous enumerations play a powerful role in determining the net adjustments to the counts, and this role is masked by smoothing adjustment factors which is probably unjustifiable.[93]

Wachter suggests that variation in erroneous enumeration could be the result of coverage improvement programs. The evidence that can be gleaned from comparing the cities of Detroit and Chicago is mixed. The main conclusion that can be drawn is that "erroneous enumerations are extremely varied. . . . [However,] lumping Detroit and Chicago together in the same post-strata, as the PES does, ignores sizable differences in coverage patterns."[94]

Wachter says that strong correlation between erroneous enumerations and omissions is insufficiently understood, even though it contributes substantially to the size of net undercounts. Since erroneous enumerations exceed omissions in a good number of post-strata, there will be a goodly number of downward adjustment. Thus "*people who themselves filled out their Census forms correctly may be 'minused out' of the Census to compensate for others who were erroneously enumerated*" to calculate an adjustment. "There may be no statistical objection to such a process. But on a human level it is offensive."[95]

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[92]Wachter, page 11.

[93]Wachter, page 10.

[94]Wachter, page 13.

[95]Wachter, page 14, emphasis in the original.

Wachter asserts that there remain uncertainties in the demographic analysis, although it has been much improved.

Wachter states that the total error model does not mean all relevant errors for assessing the accuracy of a PES are included. Rather it addresses errors at the level of the evaluation strata only and, furthermore, treats them separately with no joint error structure. There is no simple way to generalize from the evaluation strata to small areas.

The approach is novel, pioneering and controversial. Thus, the "confidence intervals" around error components are not what statisticians usually mean by confidence intervals. The total error model actually estimates only a portion of the possible sources of error in undercount estimates. Components missed are of unknown magnitude. Stratification is applied inconsistently and some of the uncertainty estimates are themselves subject to large uncertainty. The total error model is too optimistic with respect to uncertainties attributed to imputation.

For Wachter, the main lessons drawn from the total error model are that the confidence intervals for most of the non-minority strata are compatible with zero net undercount, but the intervals for all the minority evaluation strata are not. The higher estimated undercounts are subject to high estimated biases.[96]

Several critical aspects of the total error model results are then discussed by Wachter, beginning with correlation bias or "catchability error." The correlation bias assumptions used are not realistic when applied to the PES.

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[96]Wachter, page 17.

People stay out of the Census and the PES not by chance, but because they want to. Dual system estimation depends on chance mechanisms. There are many ways to allocate the twice-missed people. Whether the choice made is good is entirely speculative. How the measurement of variance in the total error model reflects correlation bias is not clear. It is better not to attempt any formal allocation of unreached people to local jurisdictions because of these problems.

Wachter next turns to matching and imputation studies. These studies of matching error give estimates of false non-matches that are too low by the very nature of their design. A small test on step-children illustrates the point that because matchers simply apply rules, they may miss true matches.[97] The effects of imputation may also be larger than the evaluation studies indicate. Wachter uses a sensitivity analysis to indicate the bounds on the effects of imputation. It shows that a great deal rests on the correctness of the assumptions in the imputation, but since these assumptions have not been examined, the measures of variance are too low.

On Guideline Two, Wachter sees "substantial obstacles to using adjusted data for Congressional reapportionment" and concludes that adjustment procedures are not well suited for coping with local heterogeneity in census undercounts. Firm conclusions cannot yet be drawn as to the extent of local heterogeneity and its implications for the accuracy of adjusted local counts.

Wachter shows by example that depending on how imputation is done, seats could shift between States in a

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[97]Wachter, page 21.

variety of ways. In estimating adjusted state population counts, adjustment factors based only on within-State data, rather than factors including across state data affect the distribution of Congressional seats as well. Among the five methods tried by Wachter, each apportionment was different and eleven states either gained or lost a seat relative to the census in at least one of the methods.

Wachter points out that there is acknowledged lack of homogeneity within post-strata. The issue is whether it is so severe to make adjustment locally infeasible. Very little is known about local heterogeneity. Experiments at the block level give ambiguous results with respect to the balance between improvements and worsenings of counts when adjustments are carried down to the block level. However, Wachter concludes that local heterogeneity is a serious problem for adjusting the counts at district office levels and that perhaps a majority of units could be made worse by an adjustment.

Wachter's experiments and analysis convince him that studies of local-level adjustment have "scarcely begun to scratch the surface" of the issue of how local heterogeneity has an impact on adjustment.[28] His block level analysis leads to more puzzles than answers.

On Guideline Three, Wachter finds that reasonable alternatives to one aspect of the smoothing model lead to significantly different adjustment factors and thus the adjustment factors cannot be considered robust. He finds that smoothing has been the most problematic part of the PES and that the smoothing has had more of an effect on the

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[28]Wachter, page 30.

final adjustment than can be easily justified. The effect of deciding to use pre-smoothed rather than unsmoothed variances in computing smoothed adjustment factors is to raise many adjustment factors by several percentage points, some by more than six percentage points. The changes introduced into the adjustment factors are of the same order of magnitude as the sizes of the adjustment factors themselves.[99] Decisions about pre-smoothing make a large difference and so alternate methods leading to different outcomes seem equally reasonable. In fact, pre-smoothing seems to run the risk of "loading the dice."[100]

Wachter argues that pre-smoothing of variances changes variances in ways that are counter to what one ought to do: reducing large variances increases the weight assigned to empirically unstable factors; increasing small variances reduces the weight assigned to stable factors. In addition, the variance smoothing process is not directed at making covariances more accurate. Furthermore, the choice among regression models is arbitrary in the sense that there is no reason to choose among them, yet the results each set produces differ from one another substantially. Finally, smoothing affects not only adjustment factors, but higher level aggregations of data.

Wachter observes that the effects of the selection of variables for the regression part of smoothing are not negligible but they are not a central issue.

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[99]Wachter, page 36.

[100]Wachter, page 37.

On Guideline Four, Wachter feels that an adjustment would reduce the stake that individuals, civic leaders and Congressional representatives would have in coverage improvement efforts. Adjustment would increase the political leverage of technical decisions and extra efforts to guarantee the Census Bureau's independence and objectivity would be required.

Wachter offers no guidance on Guideline Five.

On Guideline Six, Wachter states that sufficient data are available for a reasoned decision on adjustment.

On Guideline Seven, Wachter says that disruption is likely as a result of an adjustment, but this should not be decisive for the adjustment decision.

On Guideline Eight, Wachter sees no difficulty in meeting professional standards of the scientific community. The details of the adjustment decision tell against its understandability by the general public. Some dismay when an understanding of what adjustment really is should be anticipated, if the decision is to adjust.[101] Adjustment will have victims.[102]

Evaluation of Recommendation

I agree with Wachter's point that the PES, even if it yields results more accurate at the National level, doesn't improve the distribution of population over the results of the

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[101]Wachter, page 49.

[102]Wachter, page 49.

census enumeration totals due, in part, to "unreachable" people; among other factors.

I agree with the argument that a good PES is not a sufficient reason to adjust the census. I agree that Wachter's two other conditions are not met, *viz*, people who were missed must be reached, and why they are missed must be knowable.

I agree that Wachter's elaboration of the problem of correlation bias provides insight into why the adjusted counts produced from the PES may be distorted by correlation bias, and not simply underestimate the undercount. There are simply people who are unreachable, and determining why they are unreachable is an insoluble problem.

I agree with the analysis of discrepancies between the PES and demographic analysis.

I agree that the total error model does not include all, or necessarily even most, sources of error. I agree with the criticism that the confidence errors around the components of the model are speculative, and not uncontroversial among statisticians. Pointing out that higher estimated undercounts are subject to higher estimated biases casts serious doubt on the quality of these PES estimates.

I agree when Wachter states that the total error model does not mean all relevant errors for assessing the accuracy of a PES are included. I agree with him as he goes on to say, "Rather it addresses errors at the level of the evaluation strata only and, furthermore, treats them separately with no joint error structure. There is no simple way to generalize from the evaluation strata to small areas. The approach is

novel, pioneering and controversial. Thus, the 'confidence intervals' around error components are not what statisticians usually mean by confidence intervals. The total error model actually estimates only a portion of the possible sources of error in undercount estimates. Components missed are of unknown magnitude. Stratification is applied inconsistently and some of the uncertainty estimates are themselves subject to large uncertainty. The total error model is too optimistic with respect to uncertainties attributed to imputation."

I agree with the discussion of Guideline Two that more work is needed to determine the homogeneity problem at the local level.

I agree with Wachter's conclusions with respect to robustness that interpret findings concerning the output from different models as raising questions about robustness at lower levels of disaggregation. In addition, smoothing is correctly identified as a significant factor affecting outcomes for higher level aggregations of data.

Recommendation of Kirk M. Wolter

Summary of Recommendation

Wolter recommends an adjustment. His analysis relies on the joint paper co-authored by Ericksen, Estrada, Tukey, and Wolter. The corrected counts, as required by Guideline One for an adjustment, are more accurate in both level and distribution at the national, state, and local levels.

Wolter finds Guideline One to be the pre-eminent guideline. His conclusion that the corrected counts are more accurate is based first on the observation that the

post-enumeration survey (PES) is superior to the census by virtue of the design of matching operations and interviewer training and second, because a survey can be more tightly controlled than a census. The evaluation studies demonstrate that missing data, quality of Census day addresses, fabrication, matching, erroneous enumeration measurement, and balancing sources of error were controlled in the PES to very low levels. Correlation bias, while not so well controlled, is an error such that the PES estimates are still closer to the truth. Random error does not affect the utility of PES estimates.[103]

Wolter's rationale for preferring the adjusted counts includes four major points: (1) PES estimated undercounts agree with expectations and with demographic analysis; (2) the total error analysis demonstrates that corrected counts are more accurate for states, counties, and other similar areas; (3) corrected counts for evaluation strata, which are relatively homogeneous, offer even more improvement than they did for states, especially in comparing five minority with eight non-minority strata and central city versus non central city strata; and (4) if the stratum-level undercount rates are accurate, then the corrected counts for local areas must be an improvement on uncorrected counts.[104] This latter result is based on the Wolter/Causey paper that is appended to the coauthored report as Appendix G. Wolter also cites the plaintiffs co-authored report.

On Guideline Two, Wolter states that the bureau is capable of producing adjusted counts down to the block

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[103]Wolter, page 4.

[104]Wolter, pages 4-6.

level, so the first part of the Guideline is satisfied. As to accuracy at small area levels, Wolter notes that, synthetic estimates of the kind used on the 1990 census can improve accuracy at small area levels so long as measured undercounts at aggregate levels tend to have smaller error than the original enumeration at aggregate levels. In support of his position, he again cites the Wolter/Causey paper. The Bureau's P12 study also offers evidence that the adjusted counts are superior to the census counts at the local level.

On Guideline Three, Wolter argues that the PES adjustment procedures were sufficiently prespecified to satisfy the guideline. The three instances where the procedures were not prespecified were "treated with a high degree of objectivity and professionalism."[105] The Hoaglin and Glickman report demonstrates that corrected counts are robust to variations in reasonable alternatives in the smoothing component of the overall PES process. The Census Bureau P1 study demonstrates that the PES undercount estimates are insensitive to differences in the manner of handling missing data.

On Guideline Four, Wolter states that "it is virtually impossible to say anything about the public's cooperation with the 2000 census."[106] The National Opinion Research Center (NORC) study indicates that the average American doesn't understand adjustment, plans to participate in future censuses, and that the adjustment decision, one way or the other, would have little effect. Other countries have instituted adjustment into their censuses with no adverse

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[105]Wolter, page 9.

[106]Wolter, page 11.

effect on public participation. Using the most accurate counts is the best way to handle the perception that the adjustment decision is a politically motivated act because Wolter believes that no matter what the decision is--it will be perceived as politically motivated.[107]

On Guideline Five, Wolter acknowledges that he is not a lawyer, but his understanding is that there is no legal ruling that stands in the way of an adjustment.

On Guideline Six, Wolter finds that the necessary data upon which to base the adjustment decision are sufficient, complete and available, and provide a sufficient basis for the adjustment decision.

On Guideline Seven, Wolter finds that the States have been alerted to the possibility of adjusted counts, and can deal with it. The Census Bureau analyses of misapportionment suggests that the original enumeration would misapportion seats more than the adjusted counts. Thus, not adjusting could be viewed as generating more disruption. Wolter is "unaware of any aspect of the 1990 correction process that would cause a truly calamitous disruption of the political process."[108] No part of the correction process has been arbitrary because scientific principles have guided the effort.

On Guideline Eight, in Wolter's view, there is a clear rationale for certifying the correct counts and the Bureau's documentation of the process has been satisfactory. The

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[107]Wolter, page 11.

[108]Wolter, page 15.

Bureau and the Department should be able to articulate clearly the basis for the adjustment decision

Evaluation of Recommendation

I do not agree that the PES counts are superior to the census counts. The four points of Wolter's rationale for believing the PES superior are flawed Contrary to Wolter, PES undercounts do not agree with expectations, or the demographic analysis.[109] For example, the PES misses half a million black males which demographic analysis says are in the population. The total error analysis deals with numeric, not distributive accuracy. Thus, whatever it concludes about accuracy is not to the point of the form of accuracy which must be demonstrated.[110] The homogeneity assumption is in doubt.[111] There is not agreement on the inevitability of increased accuracy at lower levels, notwithstanding a certain degree of accuracy at broader levels.[112]

I do not agree that the synthetic estimate evidence in support of Guideline Two is clearcut, as Wolter states. In particular, P12 casts serious doubt on the homogeneity assumption necessary to a successful synthetic adjustment.[113]

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[109]See the discussion in Guideline One above.

[110]See the discussion in guideline 1 above.

[111]See Appendix 2.

[112]Wachter, pages 2-3.

[113]See the discussion of distributive accuracy in Guideline One above.

I do not agree with Wolter's interpretation of the evidence with respect to robustness. I believe that the Hoaglin and Glickman report demonstrated that thirteen different models give thirteen different answers. An outcome of that kind is not robustness in the practical sense demanded by this guideline.

I agree that Guidelines Four and Five are no bars to an adjustment decision. On Guideline Six, I note that some panelists feel there is concern that census studies were not sufficiently analyzed in the time frame agreed to in the stipulation and order.

I do not agree that the Census Bureau analyses of misapportionment of Congressional seats are adequate.[114] I do not agree that there is clear consensus that the states can deal with adjusted counts.[115] In my view, while this does not bar adjustment, it remains a consideration to be reckoned with.

Recommendation submitted jointly by Eugene P. Ericksen, Leobardo F. Estrada, John W. Tukey and Kirk M. Wolter

Summary of the Report on the 1990 Decennial Census and the Post-Enumeration Survey

The authors begin by considering the enumeration. The census differentially undercounts Blacks, Hispanics, Asians, and Native Americans. The Black undercount has

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[114]See the discussion in Guideline One above.

[115]See appendix 12.

been documented since 1940; the Hispanic since 1980. Differential undercounting is a result of the way the census is taken because it works best for "middle-class suburban" households and worst where living conditions are different. Undercount is strongly negatively correlated with the mailback rate.[116]

The authors state that the original enumeration of the population in 1990 experienced a staggering array of problems. The mail response rate was low, coverage differed between minorities and non-minorities, enumerators gathered less accurate information in cities than in other areas, and nonresponse follow-up operations had a high proportion of last resort and non-data defined responses. The difficulties in enumerating urban areas can be seen from the data. In large city offices 20% of all nonresponse followup was last resort or closeout versus 12% in small city/suburban offices and 11% in rural areas.[117]

The authors claim that last resort and closeout information is incomplete and often inaccurate. More than one-third of all last resort information and 44% of all closeout cases were estimated to be erroneous.[118] Re-enumeration of households originally enumerated by last resort or closeout showed serious errors in certain problem offices. In a national survey of 1,000 one-person households

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[116]Ericksen, *et al.*, pages 1-2.

[117]Ericksen, *et al.*, pages 4-5.

[118]Ericksen, *et al.*, page 6.

there was between a 20% and 25% error rate depending on the measure used.[119]

The authors say that coverage improvement programs, while adding people to the count, were frequently in error. For example, more than 630,000 of the 2.1 million persons added through vacant/delete either should not have been added at all or should have been added at a different place. More than half (53%) of the persons added to the count through the parolee/probationer check were estimated to have been added in error. Overall, the coverage improvement programs failed to do what they were supposed to--accurately add a substantial number of persons to the census count and the differential undercount remained after the programs had been completed.[120]

In addition to adding error to the count, the authors argue that the coverage improvement programs failed to find the estimated 19.2 million persons actually missed by the census. The "Were you counted" campaign and the Housing Coverage Check and Local review added only 200,000 and 300,000 persons, respectively, to the count. The low number of accurate additions left intact and possibly increased the differential omission rates by race and type of area that had already existed.[121]

The authors next turn to demographic analysis. Demonstrating through demographic analysis that a black

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[119]Ericksen, et al., page 6.

[120]Ericksen, *et al.*, pages 7-8.

[121]Ericksen, *et al.*, page 8.

non-black differential undercount exists for every census since 1940, the authors conclude that a black non-black differential undercount exists by virtue of demographic analysis in the 1990 decennial census.[122]

Next, the authors turn to the post-enumeration survey (PES). The PES is the mechanism designed by the Census to determine the extent of, and correction for, census error. The post-enumeration survey has demonstrated the differential undercount of the minority population and solved the major error of the original enumeration, which was the inappropriate shifting of shares of population from areas with many minorities to areas with fewer.

The authors state that the PES was a high quality survey. Completed interviews were obtained 99% of the time for the total PES sample, and for major geographic and racial subgroups. Proxy interviews accounted for 2.4% of the total sample, with little variation in this rate across subgroups. Only 1.5% of the P-sample were unresolved in the matching operation, and only 0.9% of the E-sample. There was little subgroup variation.

The authors use three criteria to evaluate the success of the PES: consistency with expectations of the distribution of the undercount (*i.e.* rates of omission and erroneous enumeration should be higher where census taking was more difficult) and the results of demographic analysis; the P studies (looking at missing data and the outcomes of rematch studies especially); and the possible shifting of population if net undercount rates were altered as a result of the P studies.

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[122]Ericksen, *et al.*, pages 10-11.

The authors state that PES results were consistent with substantive expectations especially when compared with demographic analysis.[123]

The authors' examination of P studies focused on four problems: The effect of variation in assumptions on how to treat missing data; problems due to matching error; problems with census day address misreporting and matching error for movers; and correlation bias. Assumptions about how to treat missing data had little effect. Because the numbers of movers were small, mover matching error had little effect. Correlation bias was a major source of error. Its effect tends to be to reduce estimated undercount. Evidence from evaluation poststrata research shows that adjustment increased the minority share of the nation's population by 0.8%, from 21.4% to 22.2%. The total error model showed a shift of 0.76%.[124]

The next major area considered by the authors was the smoothing of the adjustment factors. They consulted with David Hoaglin to evaluate the impact of the decisions on carrier variable choice, how to smooth variances and covariances of raw adjustment factors before calculating the regression, and how to weight individual observations when calculating the regression.

Hoaglin identified how to smooth the variances before using them to weight observations in the regression calculations and how to smooth the covariances before using them for the same purpose as key decisions.

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[123]Ericksen, *et al.*, pages 13-14.

[124]Ericksen, *et al.*, pages 12-16.

Hoaglin fitted thirteen different regressions. The first nine were based on three strategies for smoothing variances and three strategies for smoothing covariances (3x3=9); a tenth alternative was suggested by a Panel member; finally for comparison purposes he considered equal weighting of observations; weighting according to raw variances and covariances; and weighting according to raw variances, replacing the covariances by zero.[125]

After considering various alternative "stopping rules" for the "best subsets regression," Hoaglin chose a "back-2" stopping rule which uses apparently the best subset among those involving two fewer carrier variables than are in the set that minimizes the ratio residual mean square/residual degrees of freedom.

Hoaglin used two strategies to test whether the decisions had serious impact on the estimates: The first strategy used the difference in fitted values from each pair among the 13 choices and differences between the 13 and the Bureau's regression fit; while the second strategy used the reallocation of population shares among the 13 evaluative post strata.

Hoaglin stated that alternative smoothing models produced estimated population share gains for minorities that closely "surround the Bureau fit," ranging from 0.48% to 0.77%[126]

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[125]Ericksen, *et al.*, page 18.

[126]Ericksen, *et al.*, pages 17-19.

Next the authors considered errors for large and small areas. In looking at the differences in errors for large and small areas, they concluded that the total combined error increases as the size of the group decreases (*e.g.*, the combined errors for 5 million blocks will be larger than the combined errors for 1,392 poststrata), and consequently the improvement in amount due to adjustment would be nearly the same for larger and smaller groups--the improvement in percentage terms decreases, but does not change sign, as the groups become smaller.

The authors stated that since the expected CV for a sampling stratum is 1.4%, they were more likely to expect improvements for those areas where undercounts are especially high or especially low. It is these extreme cases where most of the benefit of adjustment is to be expected. Improvements in quite large areas thus prophesies improvements in very small areas, as well as in intermediate areas.

The authors' major conclusions are that error in the uncorrected census was very high; this error disproportionately affected Blacks, Hispanics, Asians and Native Americans; and the PES derived data can be used to correct the census and substantially reduce the differential undercount and improve accuracy at both national and local levels.

Evaluation of the Report on the 1990 Decennial Census and the Post-Enumeration Survey

I do not find the discussion of the quality of the census relevant. Guideline One stipulates that the census is the standard. Thus, irrespective of the flaws in the census,

Guideline One precludes adjustment unless the adjustment is shown to be better than the census by convincing evidence.

I do not agree with the statements in discussions of the PES claiming that PES results were consistent with expectations when compared to demographic analysis is made. There were sizable, and unexpected differences between the PES and demographic analysis which indicate that a PES based adjustment would be inadequate.[127]

I do not agree with the interpretation of the Hoaglin materials. The authors' interpretation misses the point. The issue is not whether the thirteen different outcomes fluctuated around a Bureau estimate of "truth" derived from the PES and are thereby defined as demonstrating sufficient robustness. The very fact of such a variety of outcomes is precisely the lack of robustness that is of concern when using a model based synthetic adjustment at a low level of geography.

The authors state that the expected CV for a sampling stratum was 1.4%. The expected CV was .7%.

I do not agree that PES derived data can be used to correct the census and substantially reduce the differential undercount and improve accuracy at both national and state levels.[128]

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[127]See the discussion in Guideline One above.

[128]See the discussion in Guideline One above, where the deficiencies in distributive accuracy of an adjusted count, using Census Bureau procedures, are detailed.

SECTION 4--DECENNIAL CENSUS PROCEDURES

In this section I provide documentation for the procedures used to conduct the decennial census, the post-enumeration survey, the evaluation of the post-enumeration survey, and the evaluation of the demographic analysis. Additional information on the post-numeration survey evaluation program and demographic analysis will be found in appendix 3.

1990 Census of Population and Housing: The Bicentennial Census of the United States

Planning for the 1990 Census began in 1984, with planning activities, testing, and preparatory operations occupying the remainder of the decade. Data were collected in 1990, and, as required by law, State population and apportionment totals were delivered to the President on December 26, 1990. The total population count transmitted to the President was 249,632,692, composed of a resident population of 248,709,873 and an overseas population of 922,819.

The Census Bureau was also required by law to deliver redistricting counts and maps to State redistricting officials no later than April 1, 1991. This was done. While the Census Bureau met its two legal mandates for the delivery of apportionment and redistricting data--two of the most important uses of census data--the 1990 census is not considered completed until all planned census data products have been released. Final products will be released in 1993.

The 1990 census involved enumerating 249,632,692 people in more than 100 million housing units, and collecting

a full range of characteristics about each person. Extensive planning and preparation, the successful recruitment and employment of hundreds of thousands of temporary census workers, and an automated management information system to keep track of operations were required to complete the census on time and within budget.

Planning and Preparation

The Census Bureau designed the 1990 census keeping in mind the special problems that arise in the census-taking process, as well as constraints of time, budget, and the need to protect individual confidentiality. Plans incorporated the lessons learned from previous censuses. The plans were tailored to implementation and management by a temporary work force in a compressed time frame. Extensive testing was conducted so that hard evidence could be gathered on the utility of new procedures and techniques. The testing also allowed new procedures and techniques to be refined and adjusted.

Formal planning for the 1990 census began in FY 1984. This early start allowed the Bureau to begin major testing of proposed design features earlier for the 1990 census than for the 1980 census (1984 vs 1976), and to conduct more major tests of proposed features than for prior censuses (e.g., 7 for 1990 *vs* 5 for 1980). Improvements were made in every phase of census-taking. Some were aimed directly at overcoming operational, control, and timeliness problems identified in 1980 census operations. Others were intended to increase the cooperation of hard-to-enumerate groups. These improvements are described in detail in "Planned Improvements in the Counts

for the 1990 Census," April 1989, Bureau of the Census. Improvements included:

• An expanded promotion campaign aimed at hard-to-enumerate groups. For example, for the first time, the Bureau used minority advertising campaigns designed by minority firms, in addition to a more traditional general-audience campaign.

• More cooperation between the Census Bureau and state and local governments. For example, the Census Bureau improved and expanded the Local Review Program, which gives local officials an opportunity to review census counts, by providing training on how to participate in the program, and by instituting two phases of review instead of one, as was the case for the 1980 census.

• Efforts intended to make it easier for people to respond to census questionnaires. For example, the Bureau expanded questionnaire assistance operations for 1990 by offering toll-free telephone assistance in English, in Spanish, and in six Asian languages, and by sending out multilingual "early alert" flyers about the census in selected areas.

• Tailoring census procedures to deal with special or unusual situations. For example, enumerators delivered questionnaires to public housing developments, and the Bureau hired public housing residents to deliver the questionnaires and conduct outreach activities at the same time.

• A greatly increased amount of automation in the census. For example, an automated management information system, in conjunction with an automated address control

file, enabled home office control and monitoring of the 1990 census to deal with developing problems early and rapidly.

• Implementing an automated geographic control system--called TIGER--in cooperation with the U.S. Geological Survey. The TIGER System solved one of the most serious problems of the 1980 census--late, inconsistent, and illegible maps. The TIGER System assured accurate and timely maps and geographic files for the 1990 census.

The 1988 dress rehearsal was the capstone of planning efforts; it was preceded by 5 years of consultation with data users and formal tests of alternative procedures and questionnaire content of the kind just described. The Bureau consulted with a wide range of data users, including minority organizations, planners and academics, business leaders, representatives of private organizations, state and local officials, and Federal agencies.

Once the basic plan for the census, including improvements, was determined, the Census Bureau began to prepare for 1990 data collection and processing. These preparations included map-making, questionnaire printing, address list construction, setting up a field structure of over 500 offices for data collection and processing, procuring and installing automated equipment, and preparing promotion materials.

A critical activity was preparation of a precensus address list. This list was used to determine which housing units had or had not returned a questionnaire in areas where householders were instructed to return their questionnaires by mail. In all, some 100 million addresses were compiled before the census from purchased lists, field canvassing by

census enumerators, and a series of overlapping checks and update operations by census workers, the U.S. Postal Service, and review by local officials.

By March 1990, all preparatory activities had been completed and the data collection phase of the census, which involved attempting to get a completed questionnaire for every person and housing unit in the Nation, was set to begin. (Enumeration of remote areas of Alaska had begun a few weeks earlier in order to complete the enumeration before the Spring thaw.)

Basic Enumeration Procedures

The 1990 census was planned to be a multiphase and incremental process that was to determine the population as of April 1, 1990. Except for remote areas of Alaska, questionnaire delivery or mail-out occurred in March 1990, but the enumeration was not intended to be over then. The Census Bureau built into the census process programs to follow up on housing units that did not return a questionnaire and to ensure that every reasonable effort was made to enumerate every housing unit. These programs extended well after April, into the fall of 1990.

90 percent of the housing units were expected to complete questionnaires and return them by mail. Two procedures were used in such mail-back areas--mail-out/mail-back and update/leave.

For the remaining housing units, householders were instructed to hold their completed questionnaires for enumerator pick-up. This procedure was called list-enumerate. Other special procedures were designed to

enumerate persons who lived in group quarters (such as college dormitories and military barracks) and persons who had no usual residence.

Mail-Back Areas

Mail-Out/Mail-Back

The mail-out/mail-back procedure was used for large cities, suburban areas, and some smaller cities, towns, and rural areas where mailing addresses were house number and street name. In all, about 83 percent of U.S. housing units were in mail-out/mail-back areas. Mail carriers in these areas delivered addressed questionnaires on March 23, 1990, and householders were asked to mail back completed questionnaires by April 1, 1990. Five out of six housing units received a short form containing *only* the questions asked of all housing units; one out of six housing units received a long form with additional questions. One week after mail-out, a post card was sent to each housing unit reminding persons to fill out the questionnaire and return it as soon as possible. This was in addition to the multiple-component promotion campaign, then at its peak.

The USPS returned some questionnaires to the Census Bureau as "undeliverable." The Bureau added a special operation to have census enumerators deliver by hand as many of the "undeliverables" as possible. The remaining housing units did not receive a mailing piece at this time, so they were enumerated during nonresponse follow-up (see below).

Update/Leave

The update/leave method was used in rural areas in the South, Midwest, and Appalachia, where mailing addresses are rural-route designations, or where many householders pick up their mail at lock-boxes. These areas contain about 11 percent of the housing units in the Nation. Here, census enumerators, rather than the USPS, delivered the census questionnaires and, at the same time, updated the address list. This operation began in early March 1990 and continued throughout that month. Just as in mail-out/mail-back areas, householders in update/leave areas were to complete and mail back their questionnaires by April 1, 1990. Again, most units received a short form, but a small pre-designated sample received the long form. Householders in these areas also received a reminder postcard asking them to return their questionnaires.

List/Enumerate

The list/enumerate, or door-to-door method, was used for about 6 percent of the Nation's housing units. These units were primarily in very remote and sparsely settled areas. There was no precensus address list for these areas. Mail carriers delivered unaddressed short-form questionnaires on March 23 and, beginning about April 1, census enumerators went door-to-door listing addresses, picking up completed questionnaires or filling out questionnaires as necessary, and administering the long form at a sample of these units.

Special Procedures

Special place enumeration took place in March and April, 1990. Special places include group quarters, such as boarding houses, nursing homes, dormitories, rectories,

convents, hospitals, etc. Enumerators visited these places to collect information from each resident. About 2 weeks before Census Day, the Census Bureau also conducted a Street and Shelter enumeration (S-night) to collect information from components of the homeless population. The first phase of this operation focused on enumerating persons staying in shelters for the homeless, while the second phase focused on enumerating homeless persons living outside of shelters, for example, on the street.

There were two additional components of special place enumeration: Transient enumeration and military enumeration.

• During transient enumeration, census workers visited travel places where guests are unlikely to have been reported at their usual place of residence, or where guests are unlikely to have a permanent residence. These places include YMCA's, YWCA's, youth hostels, commercial campgrounds, etc.

• For military enumeration, special procedures were used to count domestic military and maritime personnel. Military bases and vessels were self-enumerating. In these instances, bases appointed a senior commissioned officer to serve as the enumeration project officer.

Questionnaire Receipt

Some households received a short questionnaire containing only the questions asked of all households, while others received a long form containing additional questions. About 17 percent (or a sampling rate of about 1-in-6) of the households received the long form. However, in places with

an estimated 1988 population of less than 2,500, the sampling rate was 1-in-2. Based also on precensus estimates, very populous census blocks had a sampling rate of 1-in-8. All other areas had a sampling rate of 1-in-6.

Once questionnaires had been delivered, forms began to arrive by mail in district or processing offices serving each area. Mail returns for some areas went to a processing office for check-in. For most areas, mail returns, as well as questionnaires completed by enumerators during list/enumeration or special place enumeration, went directly to a district office. Both processing offices and district offices used automated equipment to check in forms by bar code scanning of the return envelope. The associated address in the automated address control file was then coded to show that a questionnaire had been received for that unit. At the conclusion of the check-in phase, each listing not coded represented a case that would have to be visited by an enumerator during nonresponse follow-up.

Nonresponse Follow-up

The Census Bureau followed up every housing unit for which a questionnaire was not returned. Daily reports on the mail return check-in rates for each district office were transmitted to headquarters through the automated management information system. This information was used to project the likely workloads for nonresponse follow-up. This overall workload was expected to require over 250,000 temporary enumerators to visit 30 million units over a 2 month-period. By the end of April, the Census Bureau had to estimate the number of persons it needed to hire, and to begin preparing lists of addresses that had not returned a questionnaire. The mail response rate was 63 percent, lower

than the projected 70 percent. As a result of this, the Census Bureau hired more enumerators than it had originally planned for nonresponse follow-up.

The Census Bureau completed nonresponse follow-up for the 1990 census substantially earlier than had been the case for the 1980 census, despite a larger workload. Recruitment goals were met despite the need for more workers engendered by the low mail response rate, and in spite of lower levels of general workforce unemployment than had been the case for the 1980 census.

During nonresponse follow-up, enumerators were required to make up to six attempts to contact a household member and complete a census questionnaire. If this was not possible after three personal visits and three telephone calls at different times and on different days, the enumerator attempted to obtain at least basic information on household member(s) from knowledgeable sources, such as neighbors or building managers.

Because the nonresponse follow-up had to be completed quickly so that other operations could be conducted, each district office was authorized to begin a final phase of nonresponse follow-up once 95 percent or so of the operation had been completed. During this phase, enumerators made one more visit to each remaining case to obtain as complete an interview as possible.

Coverage Improvement Efforts

Basic data collection activities included various steps designed to improve census coverage. Among these were special promotion and outreach efforts, better address listing

procedures, extra efforts to increase mail returns, follow-up on all housing units that did not return a questionnaire, better management of and pay for enumerators, etc. But after basic data collection, census plans also included additional special programs to improve the population count that went beyond standard procedures.

These additional coverage improvement programs, which represent the Census Bureau's policy of giving everyone several opportunities to be included in the census counts, added about 5.4 million persons to the census counts, or about 2.2 percent of the total enumerated population.

Such coverage improvement programs included: (1) The 100-percent recheck of vacant housing units or those identified as uninhabitable or nonexistent; (2) the "Were You Counted" campaign, an opportunity for people who thought they might have been missed to call in or fill out a census form printed in the newspaper; (3) the parolee and probationer check, which involved working with parole and probation officers to get names and Census Day addresses of parolees and probationers and add them to the census had they not already been counted; (4) the housing coverage check, in which the Census Bureau recanvassed selected blocks based on evidence brought to its attention by the automated management information system; and (5) the postcensus phase of the local government review program.

Recheck of Vacant Housing Units and Those Identified as Uninhabitable or Nonexistent

During the follow-up of nonrespondents by enumerators in May through July, some housing units were identified as vacant or uninhabitable; some addresses were

added to the address control file. Each of these units was rechecked by another enumerator in July or August.

Of the approximate 8 million vacancies, the recheck showed 7.6 percent had been occupied as of Census Day, April 1. Their occupants were enumerated at the time of the recheck. This added about 1.6 million persons to the count. Of the approximate 2.9 million units previously identified as uninhabitable or nonexistent, 5.4 percent were reinstated as occupied April 1. These conversions added almost one-half million persons to the count.

"Were You Counted?" Campaign

After the primary data collection, the Census Bureau initiated a procedure to give anyone who thought he/she had been missed the opportunity to fill out publicly available forms or call toll-free 800 numbers that operated in English, Spanish, and six Asian languages. Communities, the media, and many of the 56,000 community-based organizations that had helped initially promote answering the census were encouraged to conduct "Were You Counted?" campaigns, reproduce census-designed forms or promote call-ins to the 800 numbers. The purpose of the campaign was to give a second chance to those who might initially have avoided being counted, or to reach persons not part of the principal family in a household who might not have been listed on the household questionnaire. Initially, the Census Bureau planned to end the campaign by June 30, 1990, but because so many organizations participated, the toll-free numbers were held open until September 30.

In all, about 400,000 "Were You Counted?" calls or forms came into the Census Bureau. Although the majority

of these proved to be persons who had already been counted, the forms did add over 200,000 persons to the census.

Parolee and Probationer Count Check

Research had suggested that a group with a high probability of having been missed in prior censuses were those on parole or probation, a group consisting disproportionately of young males. Thus, in February 1990 the Census Bureau sent letters to the governors and heads of correction departments in each state and the District of Columbia asking them to participate in a program to get parolees and probationers counted. Each was asked to name a liaison to handle the program. Each liaison was sent special individual forms to distribute to their parole and probation officers, who in turn were to distribute them to those under their jurisdiction.

The response rate for the program was disappointingly low--so low in fact, that the Census Bureau sent enumerators to work with parole and probation officers to complete a form for each parolee/probationer with a verified April 1 address. As a result of this activity, it is estimated over 400,000 persons were added to the census.

Housing Coverage Check

With a computerized census that captured questionnaire data as returns came in, it was possible to make additional accuracy checks not possible in prior censuses. In August of 1990, the Census Bureau searched its data bases to identify any blocks or communities for indications of a low count. While the census was still in progress there was time for a further canvass to make

corrections. Population and housing counts, which had accrued thus far for the 39,189 units of local governments, were compared with 1980 counts and recent population estimates. The Census Bureau looked at its data on areas of new construction for possible missed new subdivisions. It also searched to see if the "Were You Counted?" forms showed any pockets of housing that might have been missed. It looked at media reports or local complaints of missed buildings or blocks. Based on these data searches, the Census Bureau decided to recanvass blocks where problems might exist. These blocks represented 15 percent of the Nation's housing units.

Postcensus Local Government Review

39,189 units of local government were sent housing counts and group quarters counts, accrued as of mid-August, to compare with local data. (New updated maps for the communities had already been sent to them in July). Governments were given 15 working days in which to challenge the housing unit or group quarters count for any block. The feedback from local governments was varied. Many took the counts to be final, although the Vacancy Recheck, the Housing Coverage Check--in fact all of the coverage improvement projects done after the primary data collection--were still in progress. All in all, 17 percent of local governments, including all of the 51 largest cities, challenged some blocks, and eight cities challenged over 2,000 blocks. Cities that challenged more than 2,000 blocks in Postcensus Local Review were Atlanta, Boston, Chicago, Detroit, Honolulu, Los Angeles, New York, and Philadelphia.

The recanvass generated by the Housing Coverage Check and Local Government Review yielded new housing units that added over 300,000 persons to the final census count.

The 1990 Post-Enumeration Survey (PES)

Background

The Census Bureau used two major programs to measure coverage for the 1990 census. The first was the Post-Enumeration Survey (PES), which was an independent survey taken after the census and then compared to the census to attempt to measure coverage error in the census. The second program was Demographic Analysis (DA). DA produced an independent estimate of total population by combining information from various sources of administrative data. The process included using historical data on births, deaths, and legal immigration combined with estimates of emigration, undocumented immigration, and Medicare information. Estimates of total population from DA were then compared with census counts to get an estimate of coverage error.

Summary

The PES was a check of the census but not a recount. After the census, interviewers returned to the field to identify all persons living in the sample of blocks at the time of the PES. During the interview, the interviewer asked where each person was living on Census Day--April 1, 1990. This information was then matched to actual census questionnaires. Most people on the PES questionnaires matched to the census. Some did not, and these are the

people estimated to have been missed in the actual census. This part of the PES was called the P-sample. People estimated to be missed based on the P-sample were estimated gross omissions in the census.

People can also be included in the census erroneously. An erroneous census enumeration, for example, could be a child born after April 1, 1990, a person who died before April 1, or a college student away from home who was enumerated at his or her parents' address instead of being correctly enumerated at his or her college. Erroneous enumerations also include persons counted twice in the census. Gross erroneous inclusions in the census were measured in the same blocks as the PES and were called the E-sample.

The data on gross erroneous inclusions and gross erroneous omissions were used to produce an estimate of the net undercount or net overcount of the population in the census. This process is described in the following paragraphs.[1]

Selecting the Sample (Sample Design)

The census attempted to cover all people and was conducted in all blocks. The PES was a sample. The PES sample was selected in stages. First a random sample of blocks was chosen. Within sample blocks, all housing units were interviewed. Within an interviewed housing unit, a PES interview was conducted for each person.

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[1]For a more detailed discussion of PES see Howard Hogan, "The 1990 Post-Enumeration Survey: An Overview," a paper presented at the American Statistical Association in August 1990.

Since the PES was a sample, if total population estimates were to be calculated based on it, the results had to be generalized to other people not living in sample blocks. One statistical method to improve the accuracy of this generalization process was to classify sample cases into groups (called post-strata) such that within a group, people were as alike as possible with regard to their propensity to be undercounted. Ancillary evidence indicates that undercoverage is worse for males than females; for minorities than non-minorities; for renters than owners, etc. Therefore, these types of characteristics were used to define the post-strata. The Bureau did not know which post-stratum to assign a person to until after the PES interview was conducted. To help insure an appropriate sample size by post-stratum, the blocks in the U.S. were stratified by similar characteristics before selecting the sample blocks from them.

All blocks in the United States were assigned to one of 101 strata. The strata were defined by geography, city size, racial composition, and percent renter. A representative set of blocks was selected from each stratum. A separate sampling stratum was defined for American Indian Reservations.

Persons living in institutions were excluded from the PES, as were military personnel living in barracks, people living in remote rural Alaska, persons in emergency shelters and persons who had no formal shelter. For each of these categories, it was unreasonable to expect to be able to conduct an independent interview in July and match them to their April 1 location.

The eventual PES sample consisted of about 168,794 housing units in 5,290 block clusters that included 12,124 blocks. (See attachment 1, "PES Sample Size by State.")

The sample was designed to achieve a .7 percent coefficient of variation. That is, the level of sampling error was expected to be .7 percent of the level of estimated undercount or overcount. So for example, if the PES estimated the undercount to be 5 percent, it was expected that the sampling error (or margin of error) on that estimate would be .35 percent. In practice, the sampling error was, on average, 1.7 times more than anticipated by the sample design.

Listing and Enumerating

In February 1990, permanent interviewers of the Census Bureau visited each of the sample blocks to list all housing units they contained. To preserve independence, none of the temporary enumerators hired to take the 1990 census was used for this operation; nor was the listing conducted out of the temporary census offices. To maintain independence, the Census Bureau did not want anyone to know where a PES sample block was so that it would be treated differently during the census.

After the completion of the 1990 census follow-up of those housing units that did not return a questionnaire (called nonresponse follow-up), a set of PES enumerators interviewed persons at households in the PES sample blocks. Although this interviewing drew from enumerators who had worked on 1990 census follow-up, steps were taken to preserve independence, such as not allowing an enumerator

to work in a block in the PES that he or she had worked in during the census.

The interviewers determined who was living in each housing unit, obtained their characteristics, and asked where they lived on April 1, 1990, Census Day. The PES interviewing began nearly 3 months after Census Day. Many people had moved during that time. In order to determine whether they were enumerated in the census, the Bureau needed to know where they lived on Census Day and, thus, enumerators asked a series of probing questions to determine occupants' Census Day addresses.

There was a quality assurance program for the interviewing phase to ensure that the interviewers really visited the household and that the people listed were indeed real. If interviewers made up people, they would not match to the census and would inflate the undercount rate.

Matching

The next step was to match the persons enumerated during the PES (the P-sample) to the census. The matching operation was the first step in determining whether persons in the P-sample were enumerated by the census or missed. Basically those persons in the P-sample matched to the census were considered to have been enumerated; those nonmatched were considered to have been missed.

Matching was carried out in four stages. It involved an initial stage of computer matching followed by two stages of clerical matching to attempt to resolve cases that the computer could not match. The two stages of clerical

matching were differentiated by the level of skill and judgment required to establish a match.

Those persons in the P-sample not matched to the census by computer and the first two stages of clerical matching were assigned for a follow-up interview, if it was determined that additional information was necessary to establish whether a match to the census was appropriate. An additional fourth stage of clerical matching was then conducted that allowed the more skilled clerical matchers to use the information from the follow-up interview to establish additional matches.

First, the matching classified people as included in the census only if they were counted at the address where they should have been counted, according to the information they provided. This concept was called "correct address" matching. For example, census rules required that a college student be enumerated at the university dormitory, not at his/her parents' home. The PES counted the student as "enumerated" only if he/she was counted at the university. If he/she was not counted at the university, then the student was classified as "omitted" even if he/she were counted at home. In order for the estimation to work out, the enumeration at home was classified as erroneous and subtracted from the census. So in this example, there would have been one omission (at the university) and one erroneous enumeration (at home). The two netted out in the aggregate. The decision to use "correct address" matching was not lightly taken. Indeed, some earlier tests used "any address" matching, i.e., attempting to search all reported addresses. Either approach has advantages and disadvantages.

The second concept was that of the search area. If a person reported that he lived at a given address, then the matching classified him as correctly enumerated if he was counted anywhere in the block. It also classified him as correctly enumerated if he was counted in a surrounding block. There was a limit to how far the matching process could search. If a census computer operation coded the address across town, for example NW vs. SE, the matching did not search there and did not find the person. The matching counted him/her as missed. To balance, the system had to count the other enumeration as erroneous, because it was outside the defined search area.

A final concept was the idea of "sufficient information for matching." When a match was found, it was easy to say that the case was enumerated. When no match was found, it did not necessarily prove that the person was not enumerated, but merely that the search had not been conducted in the correct place. A further review of the case might have shown that there was "insufficient information," leading to its being classified as "unresolved." Rules that classify cases as "sufficient information for matching" were applied before the matching begins. These rules were designed so that for matches there was confidence that the person was correctly enumerated and, equally important, for non-matches, there was confidence that the person was omitted. This approach leads to a somewhat higher "unresolved" rate, but presumably to more accurate overall results.

The accuracy and consistency of the matching process were central to the PES process. Too many matches would have decreased the estimate of population, too few would have increased it. Matching errors would have distorted the

estimated population distribution if they differed by post-strata. The rules were developed over a decade of research. The multiple levels of matching were designed to ensure that the rules were applied consistently between clerks and between offices.

The E-sample, those persons in the PES blocks who were enumerated in the census, was examined to determine if they were correctly enumerated. E-sample persons were matched back into the census to determine if they were enumerated more than once (duplicates). E-sample persons who were matched to the P-sample were assumed to be correctly enumerated (except for duplicate census enumerations). The remaining E-sample persons who were not matched to the P-sample were potential candidates for erroneous enumerations. These unmatched census persons were also included in the PES follow-up operation described above. The follow-up interviewers determined the enumeration status of those persons; that is, if they were correctly enumerated and simply not in the P-sample or if they were erroneously enumerated.

Errors in measuring census erroneous enumerations have almost as much effect on the final estimate of net undercount as errors in measuring census omissions. Reinterview and rematch studies were used to measure the error that the PES makes in measuring census erroneous enumerations and the effects of these errors on the PES estimates.

In processing the E-sample, it was important to include all census enumerations, especially those conducted long after April 1. Common sense and the results from 1980 both indicated that these were more likely to be erroneous

than those done on or near April 1. Because of this, there was a special operation to process census enumerations that were enumerated late in the census process. This operation presented special challenges in merging the data with the results of the earlier operation and completing the processing in time.

A final matching and reconciliation operation took place at the conclusion of the PES follow-up. This included the fourth stage of clerical matching for the P-sample and a determination of whether persons in the E-sample were correctly or erroneously enumerated. An important aspect of this operation was that situations arose where correct match status for persons in the P-sample, or correct enumeration status for persons in the E-sample, could not be determined. This situation occurred because the initial interview was inconclusive or because an incomplete interview was obtained during the follow-up.

Imputation and Dual System Estimation

A final PES file was created that reflected the results of the operations described above. This file included the characteristics of each person in the P-sample and the E-sample. The file also included the match status for persons in the P-sample and the enumeration status (correct or erroneous) for persons in the E-sample. As the final file was prepared, computer editing or imputation was performed to correct, insofar as possible, for missing or contradictory data. A critical aspect of imputation involved the estimation of a final match status for those persons whose match status could not otherwise be resolved. The estimation of match status was very critical. For example, mistakes in the PES matching process, which incorrectly identified persons as not

counted in the census (nonmatches), erroneously overstated the estimated undercount and vice versa.

The data in the final PES file were then summarized and incorporated with data from the full census to produce dual system (PES and census) estimates (DSE's) of total population. The DSE's were produced for unique estimation strata (or groupings of persons described below). The dual system estimator is explained more fully in Hogan's document cited above. Essentially it involves estimating how many people were (1) in the PES and in the census, (2) in the PES and out of the census, (3) in the census but not in the PES, and (4) in neither the census nor PES.

The dual system model conceptualized each person as either in or not in the census enumeration, as well as either in or not in the PES. Each person was classified according to the following tableau where the subscripts denote row and column and the stars indicate summing over the entire row/column. N^{**} denotes the entire population.

Enumeration

PES	Total	In	Out
Total	N_{**} . .	N_{*1} . .	N_{*2}
In	N_{1*} . .	N_{11} . .	N_{12}
Out	N_{2*} . .	N_{21} . .	N_{22}

All cells were conceptually observable except for N_{22}, and of course any of the marginal totals that include N_{22}. The cell N_{22} (often called the 4th cell) was an estimate of people missed in both the census and the PES. Even though not directly observable, the DSE of total population included

an estimate of people in the 4th cell. The DSE of total population was based on several assumptions. If the PES was an (approximately) unbiased sample of the whole population, then an (approximately) unbiased estimate of $N_{..}$ could be made by noting that the ratio of those in the PES and in the census to the total in the PES should have been the same as the ratio of the total in the census to the total population. Algebraically:

$$N_{11}/N_{1\cdot}=N_{\cdot 1}/N_{..}$$

Then solve for the total population:

$$N_{..}=(N_{\cdot 1}\cdot N_{1\cdot})/N_{11}$$

This is the dual system estimator of total population.

DSE's were prepared in each of 1,392 post-strata (see next section for a description). Knowing the undercount or overcount rate for each of the groups was important for estimating the net undercount at the local level. It was acceptable for both the PES and the census to have different coverage rates for different post-strata. However, if within a post-stratum, there were sub-groups where both the PES and the census had significantly lower coverage, then the DSE would have been biased.

Another type of bias would have arisen if being enumerated in the census affected the person's response to the PES, or being in the PES affected the person's response to the census enumeration. This would be the case if the PES interviewer and the enumerator compared notes, or if a person refused to cooperate in the census because he had been recently interviewed in PES. The design sought to

minimize this effect by conducting the PES after most of the census operations were completed and by conducting the PES out of the Regional Census Centers rather than out of the local District Offices that conducted the enumeration.

Post-Strata

Using the match status and key data, such as age, race, and sex for each person in the sample, the Bureau prepared DSE's of the total population for each of 1,392 groupings of people (post-strata). The reason for forming the post-strata was to group persons who had similar chances of being enumerated in the census. The post-strata were defined by census division, geographic subdivisions such as central cities of large metropolitan statistical areas, whether the person was the owner or renter of the housing unit, race, age, and sex. Each person in the PES sample belonged in one of the unique post-strata. A full description of the 1,392 post-strata is shown in attachment 2.

For purposes of illustration, the following are examples of the 1,392 post-strata. One example is a post-stratum which contains Black males, age 20-29, living in rented housing in central cities in the New York primary metropolitan statistical area. A second example is that which contains non-Black non-Hispanic females, age 45-64, living in owned or rented housing in a non-metropolitan place of 10,000 or more population in the Mountain Division. A third example is that which contains Asian males, age 45-64, living in owned or rented housing in metropolitan statistical areas but not in a central city in the Pacific Division. A fourth example is that which contains non-black Hispanic females, age 30-44, living in owned or rented housing in central cities in the Los Angeles-Long Beach primary

metropolitan statistical area or other central cities in metropolitan statistical areas in the Pacific Region. As can be seen from these examples, the 1,392 post-strata are very specific.

The Decision on Combining PES and DA Results Before Computing Adjustment Factors

It was expected that the estimate of total population from the PES would be lower than the estimate of total population from DA. That is because there is a tendency for some people to be missed in both the census and the PES. (often referred to as correlation bias.) No such bias exists with DA estimates. For that reason, there was an open decision point about whether or not to "rake" PES estimates to DA estimates before producing adjustment factors.

After examining the information, the Census Bureau decided against trying to combine the results of DA and PES. There were several reasons for the decision. Some of the main ones include:

- The PES estimate of total population was higher than the DA estimate.

- The PES estimate of females was considerably higher than the DA estimate.

- At the point in time the decision had to be made, the DA estimates were preliminary. There was concern that DA estimates might change considerably over time.

• A concern about the quality of certain components of the DA estimates; - for example, the estimate of undocumented immigrants.

• The uncertainty about how combining DA estimates might effect the assumptions underlying the DSE system.

Adjustment Factors

The next step in the post-enumeration survey process was to compare the estimated total population for each post-stratum (the dual system estimate or DSE) to the census count to determine a "raw" adjustment factor. For example, if the DSE for a particular post-stratum was 1,050,000 and the census count was 1,000,000, then the adjustment factor was 1.05, reflecting about a 5-percent estimated net undercount of variability. An adjustment factor may be less than one, thus lowering the census count in a post-stratum if an adjustment is applied. This results when there is evidence of an overcount in the post-stratum.

"Smoothing" the Adjustment Factors

The next steps were "smoothing" the variances of these "raw" adjustment factors, "smoothing" the "raw" adjustment factors themselves to reduce sampling variance associated with them, and the production of final adjustment factors incorporating both smoothing steps. Because the PES was a sample, it was subject to sampling error. Sampling error is an estimate of the error associated with taking some of the population (a sample) rather than all of the population (a census). Disaggregating 377,000 PES persons to 1,392 post-strata produced some post-strata with small sample sizes, and therefore, high estimates of sampling error. The

process of smoothing the "raw" adjustment factors to create final adjustment factors was a step to minimize the effect of sampling error.

Both "smoothing" steps were based on a multi-variate regression model. The factor smoothing step used observed characteristics that have been known to be correlated with undercount. A regression prediction model "predicted" the adjustment factor for each of the 1,392 post-strata. The final adjustment factor was then a weighted average of the originally observed adjustment factor (called "raw") and the modeled factor (from the regression prediction model.) For a post-stratum with low estimated sampling variance, there was heavy weight on the observed factor; and vice versa. The final adjustment factors by post-stratum are shown in attachment 3.

Small Area Estimation

The final adjustment factors were now ready to be used to produce adjusted counts for every block in the Nation. The PES can only produce "direct" estimates of the total population for relatively large geographic areas (i.e., the 1,392 post-strata). If there is a decision to adjust, however, the adjustment must be applied to each of the Nation's 4 million populated blocks. The Bureau developed a model that takes the adjustment factors produced for each of the 1,392 post-strata areas and uses them to estimate adjustment counts for each block. Since each of the post-strata crosses many blocks, the Bureau based its model on a critical assumption that coverage error is similar for all blocks that a post-stratum crosses.

Here are two examples of how block counts could be changed during this process. Suppose a census block with 200 people had 50 people who fell into a particular post-stratum. An adjustment factor of 1.05 was computed for that post-stratum, so 50 was multiplied 1.05, which comes to 52.5. Since procedures allowed adding only whole persons to a block, either 2 or 3 persons were added, based on a pre-specified procedure, to the persons in that post-stratum for that block. Other groupings of persons in the block in this example also were multiplied by the adjustment factor for the post-stratum into which they fell. Similarly, suppose there were 80 people in another post-stratum in a particular census block, and the adjustment factor was 0.94, indicating an overcount. 80 was multiplied by 0.94, which came to 75.2, so 4 or 5 person records were eliminated from that block.

The Bureau then produced a data file that included enumerated people plus people added (or subtracted) by adjustment. It did this by adding or subtracting "adjustment" persons with characteristics that were imputed from other persons in the same block. The "adjusted" data files could then be used to produce all required census tabulations.

The 1990 Post Enumeration Survey Evaluation Program

The Post Enumeration Survey (PES) was conducted to evaluate the coverage of the 1990 Decennial Census. Twenty evaluation projects were subsequently conducted to evaluate the PES.[2] This report briefly describes the

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[2]In this document, studies P-13 and P-14 are discussed as one study each, although each had two parts. Elsewhere, these parts may be discussed separately, which leads to a total of twenty-two studies.

objectives and implementation of these twenty PES evaluation projects.

Ten of the sources of potential error in the PES were addressed by the evaluation studies:

1. Missing Data.

2. Quality of the Reported Census Day Address.

3. Fabrication in the P-sample.

4. Matching Error.

5. Measurement of Erroneous Enumerations.

6. Balancing the Estimates of Gross Overcount and Gross Undercount.

7. Correlation Bias.

8. Small Area Estimation.

9. Late Census Data.

10. Total Error.

Each of these ten potential sources of error are herein described along with the specific PES Evaluation project used to evaluate or estimate that error.

More detailed project descriptions are found in the Project Plans dated July 31, 1990. For more detailed descriptions of the implementation and results of these

projects, see the final reports of July, 1991, whose executive summaries can be found in Appendix 3.

1. Missing Data

Both the P- and E-samples contain missing data on enumeration status. The E-sample has cases where the information required to determine whether the person is correctly or erroneously enumerated in the census is not available. The P-sample has cases where the information needed to determine whether the person is enumerated in the census is not available.

Missing data occur in more than one way. The interviewer may be unable to obtain an interview during the P-sample interview or during the PES follow-up. A P- or E-sample questionnaire may not have all the demographic and housing information to establish correct enumeration status. Finally, even with all the information requested on the questionnaires, circumstances may be so unclear that the enumeration status cannot be resolved or determined.

Missing data on enumeration status were handled in the production PES in three ways: noninterviews to the P-sample interview were handled by a weight adjustment; missing demographic characteristics in the P- and E-samples (such as age or race) were imputed by means of a hot-deck procedure; and unresolved match status cases were handled by a logistic regression technique.

Missing data can affect the estimates of undercount in a number of ways. For example, if the number of imputed correct enumerations is too high, the undercount estimate will be biased upward, or if the number of imputed

matches in the P-sample is too high, the undercount estimate is biased downward.

Project P1: Analysis of Reasonable Alternatives

The analysis was based on applying alternative missing data treatments, such as methods of handling proxy interviews and mover data, applying bootstrap samples and applying other logistic regression methodologies to study the sensitivity of the dual system estimate to the method of imputation of missing data. A narrow range of alternative estimates indicates robustness in the dual system estimates, indicating little uncertainty in the estimates due to missing data.

The following were the principal alternate imputation treatments:

P-sample Proxy Alternative: P-sample follow-up interviews marked as proxies (i.e. completed with nonhousehold member) were recoded to indicate that no interview was obtained during follow-up.

E-sample Proxy Alternative: E-sample follow-up interviews marked as proxies (i.e. completed with nonhousehold member) were recoded to indicate that no interview was obtained during follow-up.

P-sample Mover Alternative: Unresolved P-sample movers were imputed as if they were nonmovers.

1988 Style Logistic Regression Alternative: The 1990 production imputation model is quite different than the model that was used in the 1988 Dress Rehearsal. The 1988

Style Logistic Regression Model consists of several standard logistic regression models as in 1988.

Bootstrap Samples: Three E-sample and three P-sample bootstrap samples were drawn in order to measure the variation in the production dual system estimates given the PES sample of blocks. Each bootstrap consisted of selecting households with replacement within blocks.

Imputation Treatment Combinations: Dual system estimates were computed for imputation treatment combinations. The following treatment combinations were used:

P-sample Proxy and E-sample Proxy

P-sample Proxy and 1988 Style Model

E-sample Proxy and 1988 Style Model

P-sample Proxy, E-sample Proxy, and 1988 Style Model

Project P2: Distribution of Missing Data Rates

This study was based on analysis of the missing data rates observed for the P- and E-samples. The types of missing data of greatest interest are noninterviews for the initial PES interview, and unresolved cases which remain after the PES follow-up.

The objectives of PES evaluation project P2 are to determine the level and distribution of missing data by demographic and geographic breaks and to compare the

distributions with the distribution of census undercount (overcount). Hence, the following estimates are examined for P2.

1. Outcome of Interview (PES, PES Follow-up, and PES Evaluations).

2. Proxy Rates (PES, PES Follow-up, and PES Evaluations).

3. Percentage of Item Imputation (Hot-Deck and Logistic Regression).

4. Correlation Between Item Imputation and Census Undercount.

Project P3: Evaluation of Imputation Methodology for Unresolved Match Status Cases

This study was based on a reinterview of a sample of the P- and E-sample cases that were unresolved after the completion of the PES production follow-up. The reinterview also included a sample of the initial PES incomplete interviews. The reinterview was conducted immediately following the final PES matching operation. The reinterview used a probing questionnaire and better quality interviewers. In addition, the reinterview procedure allowed greater opportunity to contact knowledgeable respondents.

The objectives of PES evaluation project P3 are to: (1) provide quantitative information on the effect of the match/enumeration status imputation procedures; (2) examine quantitative measures of the effect of the noninterview

adjustment; and (3) examine the characteristics of the household noninterviews. Hence, the following aspects of the PES are evaluated in P3.

1. Match/Enumeration Status Imputation.

2. Converted PES Noninterview Households.

3. PES Noninterview Household Characteristics.

2. Quality of the Reported Census Day Address

Dual system estimation assumes that P-sample respondents can be linked, or matched, correctly to their census day address. This evaluation measures address reporting and the error in the number of people matching a census enumeration due to address reporting error. Census Day was on April 1, 1990. The PES was conducted in July and August, 1990. Thus, some of the respondents had moved between the time the census was conducted and the PES was in the field. However, in spite of probes on the PES interview questionnaire, respondents may fail to report that they moved. This type of error may cause the matching operation to search the census in an area other than where the respondent was enumerated and to assign a nonmatch status to respondents who might have been enumerated.

Project P4: Quality of the Reported Census Day Address--Evaluation Follow-up

An additional reinterview of a sample of P-Sample cases from the production follow-up was conducted. The sample consisted of nonmatches and unresolved P-sample cases in the PES block clusters selected for the evaluation

follow-up. Some matches from whole household matched households were subsampled within each cluster. In addition, matches were selected from partially matched households. A specially designed questionnaire with special probes was used by highly skilled enumerators (Census Bureau Field Representatives). The reinterview allowed greater opportunity to contact designated respondents and probe more deeply for census day accuracy of the PES process for identifying movers and the quality of mover address reporting. Therefore, reviewing these results allowed an assessment of the accuracy of the census day address reported in the production PES.

This evaluation is based on a follow-up and reinterview operation that took place immediately following the final PES matching operation. The follow-up operation consisted of a sample of P-sample matched and nonmatched persons who were excluded from the production follow-up. A review of the results of this follow-up addressed the questions concerning the assumptions underlying the rules that were used in determining which cases should be sent for the production follow-up. This operation was done after PES production matching had been concluded.

3. Fabrication in the P-Sample

Interviewers, for whatever reason, may fabricate persons within enumerated housing units. The PES program had an extensive quality control (QC) program that identified and corrected fabrications. However, even with the best of intentions fabrications potentially remain after this operation. Three studies were implemented to address the effect of any uncorrected fabrications that remained in the data set after the quality control operation. The first study (P5a) identifies

the residual fabrication by means of the evaluation follow-up and revisit interviews; subsequent matching of these households will identify fabrications. The second study (P5) utilizes the PES field operation quality control records to estimate "upper bound" residual PES fabrications. The third study (P6) provides model-based estimates of fabrications by comparing, at the block level, interviewer nonmatch rates with "nearby" interviewer nonmatch rates. These comparisons provide an indication of the quality of the interviewers work.

Project P5a: Analysis of P-Sample Fabrication From Evaluation Follow-up Data

The evaluation follow-up described for Project P-4, provided estimates of P-sample fabricated persons. These estimated fabrications can be used as independent estimates (from the quality control) of the level of fabrications in the P-sample. In addition, the quality control operations for the PES interviewing were assessed by comparing the estimated residual error rate from quality control records with the estimated fabrication rate from the follow-up.

Project P5: Analysis of PES P-Sample Fabrications From PES Quality Control Data

The data for project P5 comes from the Quality Control operation of the PES interviewing phase. The purpose of the QC check is to confirm that the PES interviewer visited the correct housing unit and conducted the interview according to the survey procedures. The roster of names, ages and census day addresses are all verified during the interview for the QC sample. A P-sample questionnaire fails the QC check when the household roster

is incorrect. When an error is detected, all the recent work of the production interviewer undergoes a QC reinterview. Fabricated households discovered as a result of the QC reinterview are not used and correct interviews are obtained. Overall, approximately 35 percent of the P-sample (i.e., 56,000 households) were reinterviewed in the QC operation of the PES interviewing phase through telephone calls and personal visits.

The central problem or assumption of investigation for project P5 is the estimation of the amount of residual (i.e., undetected) fabrication that exists in the P-sample after the QC operation has been concluded. This analysis provides estimates both in terms of households and persons within these households.

Project P6: Fabrication in the P-Sample: Interviewer Effect

The objective of P6 was to gain knowledge about possible undetected fabrication in the PES. Though it is expected that curbstoners make up only a fraction of the PES work force and the quality control detects and eliminates such curbstoning, the potential impact of undetected fabricated data can be serious. This type of error inflates the undercount estimate. In addition, the inflated nonmatch rates are likely differential, i.e., larger for some post-strata than others.

The purpose of this study was to evaluate the quality control procedure implemented in PES to see how effective it was in detecting fabrication. This was done by developing a model to predict the nonmatch rate from the actual nonmatch rate obtained by interviewers working in areas with households of similar demographic characteristics. The

assumption underlying the model was the interviewers working in similar areas would have similar nonmatch rates and the deviations from the model would indicate undetected curbstoning. Standardized scores (Z-scores) were computed for each interviewer rather than comparing the absolute differences between the observed and the expected rates. This was done to take into account the size of an interviewer's assignment. Interviewers with large scores differed greatly from the model predication, and were identified as potential curbstoners or poor quality workers. These enumerators were further studied to determine where they had worked and whether they had been detected by the PES QC operation.

4. Matching Error

Errors can occur in the operation where P-sample persons are matched to the original census enumerations. This matching operation was conducted in seven processing offices (PO's). Even though great efforts were made to standardize this operation across all PO's, errors could be relatively concentrated. Two studies were conducted to examine this type of error. The first study (P7) utilized a team of professionals to dependently rematch a subsample of PES block clusters; this operation is referred to as the Matching Error Study. The rematchers had access to the match codes assigned by the PES production matchers, and worked on assignments in PO's other than their home PO where they worked on PES production. The rematch was designed to estimate the net error rate in the assignment of enumeration status in the P-sample and the E-sample. The second study (P5) examined PES production quality control records. This analysis provides insight into the nature of

PES production matching error by examining where differences occur within this multi-tiered operation.

Project P7: Estimates of Clerical Matching Error From the Evaluation

This evaluation was based on a rematch of a subsample of the PES blocks by highly skilled personnel. This project also allowed additional field work as required, when additional information was determined to be necessary to resolve specific cases. The assumption underlying the evaluation is that better training and personnel can detect systematic errors in the matching.

The subsample of blocks included in this evaluation was based on a stratified sample designed to give a higher probability of selection to blocks with potential matching problems. In addition, the highly skilled personnel used for this evaluation were assigned to work in different processing offices, to the extent possible, to minimize redoing blocks that they previously processed.

Project P8: Matching Error--Estimates of Clerical Matching Error in the P-Sample From Quality Assurance Results

This evaluation was carried out by comparing the results of the PES matching quality control operation to determine where potential inconsistencies existed.

At the conclusion of the computer matching, the clerical matching proceeds with an initial stage of clerical matching (CMG) followed by a more extensive stage of matching by another group of more qualified special matching group clerks (SMG1). Another special matching

group (SMG2) also conducted matching on the same cases as the CMG and SMG1 stages. Discrepancies between the SMG1 and SMG2 are adjudicated by a higher level PES matching technician.

Comparing the differences between the various stages of matching can identify potential areas where matching error can exist. These findings may be of interest in interpreting the results of project P-7.

5. Measurement of Erroneous Enumerations

Some census enumerations are in fact erroneous. The following enumerations are erroneous:

(1) Duplicated persons.

(2) Fictitious persons.

(3) People who died before Census Day.

(4) People who were born after Census Day.

(5) People enumerated outside the search area where they were living on Census Day.

An estimate of erroneous enumerations is needed for the PES-census dual system estimate of the total population. Three studies investigate errors in classifying the enumeration status (correct or erroneous) of the E-sample persons. The first study (P10) utilized the same team of highly skilled professionals as did project P7 to dependently review the PES E-sample production results in a subsample of PES block clusters. This operation was part of the

Matching Error Study. The focus was on the errors that occurred during PES production processing involving duplicates and fictitious persons; however, there was also an examination for the above (3), (4), and (5) type errors. The second study (P9a) utilized data collected from the evaluation follow-up interviews. The evaluation follow-up questionnaire was administered by more competent interviewers than was used by PES production. Also, this questionnaire had more probes than the standard PES production follow-up questionnaire. An alternative estimate of erroneous enumerations resulted from this operation. The third study (P9) is a consistency check; an examination of PES E-sample cross-tabulations provides evidence as to whether a particular type of error in classifying enumeration status is present in the data.

Project P10: Accurate Measurement of Census Erroneous Enumerations--Clerical Error in Assignment of Census Enumeration Status

This evaluation was conducted as part of the rematch work described for Project P7, Evaluation of Clerical Error in the P-sample matching. The study used the same subsample of PES blocks. The E-sample for these blocks underwent the intensive review by highly skilled matchers. This work was supplemented by the reinterview described for Project P9a. The objective was to determine whether the production matching operations are correctly classifying census erroneous enumerations.

The combination of both of these projects--P7 and P10-is referred to as the Matching Error Study (MES).

Project P9a: Accurate Measurement of Census Erroneous Enumerations--Evaluation Follow-up

A sample of E-sample cases was sent for a PES evaluation field follow-up to determine whether a person was correctly enumerated in the Census. The sample included both E-sample cases where an interview was obtained and those where a follow-up interview was not completed. The follow-up reinterview was conducted with more experienced enumerators using a more probing questionnaire. In addition, the follow-up allows greater opportunity to contact a respondent and obtain a complete interview. This same evaluation follow-up was used as part of Project P7 and Project P4. The completed evaluation follow-up interview was clerically matched back to the census to assess the accuracy of the PES production procedure in classifying a persons enumeration status.

Project P9: Accurate Measurement of Census Erroneous Enumeration--Consistency Checks

This evaluation was based on examining a variety of cross tabulations prepared from the PES E-sample for each evaluation stratum. Data such as the following was cross-tabulated:

(1) Enumeration status (correct enumeration, erroneous enumeration).

(2) Type of respondent (original census residents, current residents, neighbors, other proxies).

(3) Source of census enumeration (mailback, enumerator return).

(4) Age group.

(5) Enumeration status of other household members (whole household erroneously enumerated, partial household erroneously enumerated).

The cross tabulations were examined to assess whether the pattern of erroneous enumerations was consistent with previous experience and research findings. Unexplainable discrepancies in the erroneous enumerations were considered as potential indications that the PES process incorrectly measured erroneous enumerations.

6. Balancing the Estimates of Gross Overcount and Gross Undercount

Because of the limited search area that is used to estimate P-sample nonmatches and E-sample erroneous enumerations, balancing error can occur. There was no plan to obtain a direct estimate of this type of error. The components of balancing error are included in the measures of errors that are produced from other studies such as P-7 and P-10 (matching error studies)

Project 11: Balancing Error Evaluation--Percentage of Matches Found Outside Sample Blocks

This evaluation used supplementary information to assess whether balancing is an issue in the performance of PES. Inconsistencies found are indications of potential failure of balancing and should be indications of which of the evaluation studies should reflect these errors. The P-sample match rates for the PES blocks and surrounding blocks were compared with the rates at which E-sample persons are

found to be in the PES blocks and in the surrounding blocks. These rates should be the about the same. Differences found were evaluated using the results of the evaluation follow-up.

The rate at which movers matched in the blocks to which they were geocoded was also studied. These rates should be consistent with the corresponding rates for the P-sample nonmovers in the same post-strata.

7. Correlation Bias

The dual system estimation used for the PES is based on several independence assumptions. Two that are of particular interest are homogeneity and causality. The homogeneity assumption requires that everyone has the same probability of inclusion in both the P-sample and the census within the same post-stratum. Failure of the homogeneity assumption usually is seen in an understatement of the undercount for a population group (such as Black males). The causality assumption requires that inclusion in the census does not influence inclusion in the P-sample or vice versa.

Two studies were directed at studying the adequacy of the homogeneity assumption. The first study (P13) compares the dual system estimates with demographic analysis to obtain an estimate of correlation bias at the national level. The second study (P17) is qualitative in nature, and compares the PES dual system estimates, the individual P- and E-samples, and demographic analysis to determine if inconsistencies exist that could indicate the presence of correlation bias due to failure of the homogeneity assumption.

The causality assumption is investigated by two qualitative studies (P14 a and b). The first of these studies pairs non-PES blocks with similar PES blocks and compares characteristics. There should be no difference between these blocks except for the random variation introduced by sampling. The second study uses a debriefing of field interviewers to assess the potential for correlation bias.

Project P13: Use of Alternative Dual System Estimators to Measure Correlation Bias

Alternative dual system estimators were developed using information from demographic analysis to try to address the problem of correlation bias due to failure of the homogeneity assumption--when people missed by the census are more likely to be missed by the PES than those included in the census and vice-versa. This was done by using demographic analysis sex ratios (the ratio of males to females) and the PES dual system estimates for females to create an alternative estimate for males. The DSE for females was multiplied by the sex ratio appropriate for each PES age group. By comparing these alternative estimates for males with the PES dual system estimates for males gives an estimate of correlation bias at the national level. The estimated correlation bias was then allocated to the individual PES male post-strata proportional to P-sample non-matches. This permitted estimates of correlation bias to be produced at the individual post-stratum level.

Project P17 Internal Consistency of Estimates

This study has two objectives: (1) to evaluate the reasonableness of the age sex distribution in the census and PES estimates and (2) to compare the PES and demographic

analysis (DA) estimates of undercount to make some assessment of the accuracy of the PES estimates. For these purposes, sex ratios and information on undercount rates from the PES and DA were used. Sex ratio are used to evaluate if overall results on sex distribution are reasonable. Because demographic analysis estimates are available at the national level only, most comparison are limited to analyzing data for the U.S. by race black and non-black.

Project P14 Independence of the Census and P-Sample, Comparison of Blocks

The analysis for this project is directed at assessing the existence of correlation bias due to failure of the causality assumption:

The probability of an individual being included in the P-sample is not altered by inclusion in the census, and the probability of being included in the census is not altered by inclusion in the P-sample.

Several steps were implemented to study the existence of correlation bias. First, a sample of PES blocks paired with comparable non-PES blocks was drawn. The sample was selected by type of enumeration area (TEA) in order to do analyses isolating these groups. Each type of enumeration was analyzed as a separate data set since the timing of the PES and census operations were different across areas. Therefore, any PES effects on the census would be different for each TEA and should be tested using separate data sets.

The difference from PES blocks and non-PES blocks were the focus of the tests. For each block, relevant data

were extracted from the final census files in January, 1991 and aggregated from person records to block level records. The preliminary variables were organized a priori into groups: block size, population coverage, housing unit status, mailback, field response, and edit & quality. The data were tested for relevance, completeness, and redundancy.

8. Small Area Estimation

Project P12: Evaluation of the Synthetic Assumption

Synthetic adjustment is used in the PES to "carry down" the estimated adjustment factors to the census counts in each post stratum. This synthetic adjustment assumes that the probability of being missed by the census is constant for each person within the post-stratum.

The coverage error may vary substantially within the PES strata although the post strata were drawn so as to be homogeneous with respect to expected coverage error. The goal of this study is to verify that the assumption underlying the synthetic adjustment is valid.

The analysis was based on studying the homogeneity of several different block level statistics. Three different types of analysis were conducted. First the distributions of census characteristics thought to be highly correlated with coverage error (e.g., mail return rate) were examined. Secondly, the distribution of the components of coverage error at the block level were studied. These components were erroneous enumeration rates and P-sample nonmatch rates. Finally, the production smoothing model was used to predict a block level adjustment factor for the same sample of blocks used for the first analysis.

The analysis concentrated on determining whether the block level statistics clustered unusually by state within the PES post-strata. Further analysis to examine clustering at other levels such as place and county remains to be carried out.

9. Late Late Census Data

Project P18: Evaluation of Late Late Census Data

Census data capture was completed after the completion of the last planned PES matching operation which was Late Census Data matching. A small amount of changes to census data (census additions, deletions and updated person data) resulted from the late census data capture activities. A portion of these changes were included into the PES results through the Late Late Census Data (LLCD) matching operation. The remainder of these late census data changes were not processed due to time constraints, and were not included in the PES results. The Evaluation of Late Late Census Data (Project 18) examines the effect that the late census data changes not included in the PES have on the PES estimates of undercount. The remaining late-late census data were processed to determine the effect that this would have had on the dual system estimates.

10. Total Error

Project 16: Total Error in PES Estimates for Evaluation Post Strata

The dual system estimator used in the estimation for the PES is known to be subject to various components of nonsampling error, in addition to sampling error. The PES

evaluation program includes studies that provide direct measures of error due to nonsampling and sampling error components. These errors combine in the dual system estimator model to cause differences from population counts that would be attained under an error-free program. The difference between the PES estimate and the error-free count is referred to as the total error.

Project P16 evaluates both the components of error and the total error in the PES estimates for the 13 evaluation post strata. The components of error are response correlation bias (also called model bias), matching error, quality of reported Census Day address, fabrication in the P-sample, processing error in the E-sample, data collection error in the E-sample, error in balancing the estimates of the gross overcount and the gross undercount missing data (imputation error), sampling variance, and ratio estimator bias.

The evaluation of the total error assesses the overall accuracy of the PES estimates of population size and the census undercount rate. A synthesis of the components errors provides estimates of the bias and variance. This analysis then assesses the combined effect of the errors on the PES estimate of the undercount rate. The estimates of the mean and variance of the distributions of the component errors are based on the conclusions drawn from the various evaluation studies. The simulation method produced an estimate of the bias and variance of the estimated undercount rate.

The results of the total error model were also used in a loss function analysis to assess the accuracy of the distributions of population across states, places, and counties

for the adjusted and unadjusted census. This analysis was carried out by forming target populations from the results of the total error work. The biases measured by the PES evaluations were incorporated into PES dual system estimates to produce corrected estimates of the population. These corrected estimates were designated as the target populations. The adjusted and unadjusted census population distributions were compared to the target population distributions using several loss functions. The comparisons were conducted at the state level and at the place and county level for the following size categories:

Places under 25,000 population.

Places of between 25,000 and 50,000 population.

Places of size over 50,000.

Counties under 200,000.

Counties larger than 200,000.

In addition, results were also produced for places and counties over 100,000 population.

Demographic Analysis

The Census Bureau's companion coverage measurement program to the PES was demographic analysis. The demographic coverage estimates could only be used to evaluate the completeness of coverage of the 1990 census at a national level and only for race (Black/Non-Black), sex, and age groups. Demographic analysis could not provide even reasonably reliable coverage estimates for the Hispanic,

Asian/Pacific Islander, or American Indian/Native Alaskan populations because these characteristics have not always been recorded on birth and death certificates; nor can the demographic method provide direct estimates of the resident population at the State or substate level. However, the PES measured under or overcounts of these groups. The demographic coverage estimates were compared to the post-enumeration survey coverage estimates to assess the overall consistency of the two sets of estimates at the national level.

Demographic analysis uses historical data on births, deaths, and legal immigration; estimates of emigration and undocumented immigration; and Medicare data to develop an independent estimate of the resident population on census day. The estimate is compared with the census count to yield a measure of net census coverage and net undercount. The particular procedure that is used to estimate coverage nationally in 1990 for the various demographic subgroups depends primarily on the nature and availability of the required demographic data. Birth and death records are available for the entire United States from 1933 on for developing estimates of population at ages under 57 in 1990. In estimating births for each year, the Bureau added to the number of registered births an estimate of underregistration. Underregistration was estimated based on tests conducted in 1940, 1950, and 1964-1968. If the estimates of underregistration are off, they could have a significant effect on undercount estimates because birth data are by far the largest component in estimating the population through demographic analysis. In fact, in producing the demographic estimates of population for 1990 the Bureau revised the estimates for certain Black birth cohorts to account for biases

that recent research identified in the birth registration test result of 1940.

National birth and death records are not available before 1933, so the Bureau had to find other ways to estimate the population size of these cohorts in 1990 (ages 55 and over were estimated). For the population 65 and over, administrative data on aggregate Medicare enrollments for 1990 (adjusted for underenrollment) are used to estimate population and net coverage. For the Non-black population aged 55 to 64 in 1990, the estimates of population are based primarily on national birth estimates for 1925-1934 developed by Whelpton. For the Black population aged 55 to 64 in 1990, the estimates of population are based on revisions of estimates for the cohort in 1960 developed by Coale and Rives.

In addition to subtracting deaths, the estimates of births described above are augmented to account for change due to immigration, emigration, and net international movement abroad of citizens (including the Armed Forces and Puerto Rican migrants). The various components of net migration vary significantly in their completeness and quality. The United States does not keep emigration records. Therefore, an estimate had to be made of those who have left the country. While the United States does have good records of legal immigration, there is no accurate estimate of illegal immigration--the most elusive demographic component of population change. The Census Bureau has developed a preliminary estimate for undocumented residents in 1990 based on analysis of survey data and administrative records of the Immigration and Naturalization Service (INS). The INS now collects different information than it did prior to 1980. Recent

immigration reform further complicated the effort to estimate legal immigration and undocumented residents. Although the legislative reform allowed many undocumented aliens to receive amnesty, some of these persons may not actually reside in the United States.

It should be noted that before the demographic estimates of population for race groups are compared to the census to calculate the net undercount, the race categories of the census counts must be "modified" so that they are consistent with the race categories of the historical demographic estimates. Specifically, 9.8 million persons in the 1990 census (mostly of Hispanic origin) reported their race in the "Other race-not specified" category, a category not included in the demographic estimates. This modification added 497,000 persons to the census count for Blacks. Also, the age categories of the 1990 census counts have been "modified" so they are consistent with the April 1, 1990 time reference of the demographic estimates.

It is important to emphasize that results of demographic analysis are not exact but are estimates. To a large extent, they were based on assumptions and best professional judgment. As in the PES, the Bureau tried to estimate potential error in the data produced by demographic analysis. To estimate that overall error, the Bureau conducted 11 detailed demographic analysis evaluation studies to find out as much as possible about each possible source of error--the specific projects are identified in Table 1. Based on these studies, the Bureau developed a range of error around the demographic analysis estimates. Since these evaluation projects and the demographic error model represent an evaluation program new for the 1990 census, the assessments of potential error are subject to change and

improvement over time just as the basic demographic estimates of coverage have been.

Table 1.--The Eleven Demographic Analysis Evaluation Projects

D1 ... Error in Birth Underregistration Completeness Estimates.

D2 ... Uncertainty in Estimates of Undocumented Aliens.

D3 ... Uncertainty in Estimated White Births, 1915-1935.

D4 ... Uncertainty in Estimated Black Births, 1915-1935.

D5 ... Robustness of Estimated Number of Emigrants.

D6 ... Robustness of Estimates of the Population 65 and Older.

D7 ... Uncertainty Measures for Other Components.

D8 ... Uncertainty of Models to Translate 1990 Census Concepts into Historical Racial Classifications.

D9 ... Inconsistencies in Race Classifications of the Demographic Estimates and the Census.

D10... Differences Between Preliminary and Final Demographic Estimates.

D11... Total Error in the Demographic Estimates.

Attachment 1

PES Sample Size by State (P-Sample)

State names	Blocks	Clusters	Housing units
Alabama	280	168	4,706
Alaska	27	16	946
Arizona	569	115	5,046
Arkansas	161	77	2,230
California	652	390	13,013
Colorado	401	101	3,290
Connecticut	74	55	1,816
Delaware	19	12	460
District of Columbia	22	18	657
Florida	298	198	5,973
Georgia	189	112	3,320
Hawaii	49	19	599
Idaho	226	51	1,697
Illinois	300	221	7,553
Indiana	149	92	2,540
Iowa	179	86	2,491
Kansas	264	74	2,188

State names	Blocks	Clusters	Housing units
Kentucky	177	107	3,116
Louisiana	165	105	3,481
Maine	216	67	2,292
Maryland	72	56	2,162
Massachusetts	162	107	3,185
Michigan	232	152	4,959
Minnesota	256	99	3,186
Mississippi	179	103	2,696
Missouri	215	116	3,369
Montana	409	46	1,755
Nebraska	140	44	1,257
Nevada	66	27	1,195
New Hampshire . .	118	49	1,987
New Jersey	117	91	2,752
New Mexico	553	68	2,533
New York	520	371	12,210
North Carolina . . .	209	126	3,754
North Dakota	205	19	679
Ohio	216	146	4,491
Oklahoma	271	93	2,737
Oregon	310	83	2,575

State names	Blocks	Clusters	Housing units
Pennsylvania	499	303	9,517
Rhode Island	32	24	832
South Carolina . . .	107	58	1,900
South Dakota	230	18	686
Tennessee	243	173	4,858
Texas	845	436	12,807
Utah	212	40	1,351
Vermont	115	28	1,423
Virginia	144	87	2,609
Washington	352	111	3,939
West Virginia	49	31	911
Wisconsin	141	76	2,264
Wyoming National	488	26	801
Total	12,124	5,290	168,794

Attachment 2

1990 Post-Enumeration Survey Post Strata

The 1990 Post-Enumeration Survey (PES) will provide direct estimates for 1392 post strata. The post strata

are designed to divide the PES sample blocks into groups which have similar characteristics. This helps the Census Bureau to estimate the coverage of the 1990 decennial census more accurately.

The post strata are defined by census division, area (city, non-city, rural, etc.), race, Hispanic origin, tenure group, sex, and age. Tenure refers to whether housing units are owned or rented. Each post strata is given an eight digit code. The attached document shows 116 post strata and the corresponding first six digits of the post stratum code for each. The last two digits are not delineated on the attachment. They define sex and age group. There are six age group classifications. What follows is an explanation of the post strata coding system:

The first digit of each given eight digit code defines the census division. The nine census divisions and the states in each census division are:

1--New England--Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont

2--Middle Atlantic--New Jersey, New York, and Pennsylvania

3--South Atlantic--Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, and West Virginia

4--East South Central--Alabama, Kentucky, Mississippi, Tennessee

5--West South Central--Arkansas, Louisiana, Oklahoma, and Texas

6--East North Central--Illinois, Indiana, Michigan, Ohio, and Wisconsin

7--West North Central--Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota

8--Mountain--Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming

9--Pacific--Alaska, California, Hawaii, Oregon, and Washington

Within each census division, the geographic areas are divided by type of area. There are nine possible type of area codes:

0--Central cities in explicitly named PMSAs (see description below)

1--Central cities in large metropolitan areas (Type I MAs)

2--Central cities in small metropolitan areas (Type II MAs)

3--Central cities in a metropolitan area regardless of size

4--Non-central city areas in the New York PMSA

5--Non-central city areas in large metropolitan areas (Type I MAs)

6--Non-central city areas in small metropolitan areas (Type II MAs)

7--Non-central city areas in metropolitan areas

8--Non-metropolitan areas incorporated places with 10,000 + population

9--Balance of non-metropolitan areas

A PMSA is a Primary Metropolitan Statistical Area. There are four explicitly named PMSAs in the 1990 PES post strata. These PMSAs and the census division in which they are located are:

- The New York City PMSA in the Middle Atlantic division,

- The Houston PMSA plus the Dallas PMSA, plus the Fort Worth PMSA in the West South Central division,

- The Chicago PMSA plus the Detroit PMSA in the East North Central division,

- The Los Angeles-Long Beach PMSA in the Pacific division.

A large metropolitan area (type I MA) is an area whose largest central city has a population of at least 250,000 using the 1990 census person count.

A small metropolitan area (type II MA) is an area which does not have any central cities with a population of 250,000 or more.

The balance of non-metropolitan areas consist of areas which are not included in area type number 8. This would consist primarily of rural areas.

Any post strata can include up to three area types. The area types included in a stratum are delineated in the second to fourth digits of the post strata code. For instance, post strata code 578910 includes area types 7, 8, and 9. But most post strata contain only one area type. If a post stratum has only one area type, the second digit of the post stratum code indicates the area type, and the third and fourth digits are zero. In general, each of the second through fourth digits is filled with a zero from the right if a given geographic area of post stratum contains less than three area types.

The race/hispanic origin is determined by the fifth digit of the post stratum code. The tenure group is determined by the sixth digit of the post stratum code. These three attributes are combined in the coding system. The possible race/hispanic origin groups are: Black, Non-Black Hispanic, Asian-Pacific Islander, American Indian, and Other. A post stratum can consist of more than one race/hispanic origin group. This is reflected in the

definitions below. The tenure designation defines whether the persons in the geographic area are owners or renters. Some geographic areas were not divided by tenure. The possible codes for the fifth and sixth digits are:

10--Black (Renter & Owner)
11--Black Renter
12--Black Owner
20--Non-Black Hispanic (Renter & Owner)
21--Non-Black Hispanic Renter
22--Non-Black Hispanic Owner
30--All Other (Renter & Owner)
31--All Other Renter
32--All Other Owner
40--Asian-Pacific Islander (Renter & Owner)
41--Asian-Pacific Islander Renter
42--Asian-Pacific Islander Owner
50--Black and Non-Black Hispanic (Renter & Owner) & Non-Black Non-Asian-Pacific Islander Hispanic
60--American Indian

The seventh digit of the post stratum code defines the sex.

1--Male
2--Female

Within sex there are six age groups, the eighth digit. The age groups are:

1--0-9
2--10-19

3--20-29
4--30-44
5--45-64
6--65+

Attachment 3.--Adjustment Factors by Post Stratum[1]

Stratum code	Factor
09006011	1.166
09006012	1.182
09006013	1.158
09006014	1.197
09006015	1.117
09006016	1.143
09006021	1.130
09006022	1.189
09006023	1.166
09006024	1.071
09006025	1.068
09006026	1.097
13003011	1.001
13003012	0.987
13003013	1.034
13003014	0.984
13003015	0.991
13003016	0.964
13003021	0.989
13003022	0.979
13003023	1.007
13003024	0.976
13003025	0.981
13003026	0.957
13705011	1.068
13705012	1.027
13705013	1.079
13705014	1.068
13705015	1.040

Stratum code	Factor
13705016	1.012
13705021	1.047
13705022	1.008
13705023	1.050
13705024	1.041
13705025	1.012
13705026	1.015
17003011	1.020
17003012	0.989
17003013	1.030
17003014	0.990
17003015	1.014
17003016	0.987
17003021	1.016
17003022	0.974
17003023	1.021
17003024	1.007
17003025	0.994
17003026	0.975
18003011	1.025
18003012	0.980
18003013	1.030
18003014	1.028
18003015	1.011
18003016	0.984
18003021	1.007
18003022	0.974
18003023	1.003
18003024	1.008
18003025	1.002
18003026	0.995
19003011	1.022
19003012	1.008
19003013	1.073

Stratum code	Factor
19003014	1.028
19003015	1.024
19003016	1.013
19003021	1.017
19003022	1.003
19003023	1.018
19003024	1.013
19003025	0.996
19003026	1.006
20001111	1.111
20001112	1.076
20001113	1.122
20001114	1.102
20001115	1.043
20001116	1.077
20001121	1.112
20001122	1.031
20001123	1.090
20001124	1.114
20001125	1.038
20001126	1.050
20001211	1.022
20001212	0.994
20001213	1.010
20001214	0.990
20001215	0.991
20001216	0.980
20001221	1.055
20001222	0.997
20001223	1.019
20001224	0.989
20001225	0.982
20001226	0.981
20002011	1.050

Stratum code	Factor
20002012	0.990
20002013	1.053
20002014	1.018
20002015	1.024
20002016	1.002
20002021	0.995
20002022	1.002
20002023	1.033
20002024	1.015
20002025	1.005
20002026	0.994
20003111	0.993
20003112	0.997
20003113	1.113
20003114	1.041
20003115	1.016
20003116	0.964
20003121	1.001
20003122	0.954
20003123	1.054
20003124	1.011
20003125	0.987
20003126	0.935
20003211	0.988
20003212	0.993
20003213	1.013
20003214	1.001
20003215	1.017
20003216	0.954
20003221	1.030
20003222	0.980
20003223	1.017
20003224	1.012
20003225	0.972

Stratum code	Factor
20003226	1.002
20004011	1.130
20004012	1.124
20004013	1.156
20004014	1.107
20004015	1.104
20004016	1.095
20004021	1.128
20004022	1.069
20004023	1.130
20004024	1.133
20004025	1.101
20004026	1.081
21001111	1.092
21001112	1.037
21001113	1.126
21001114	1.107
21001115	1.063
21001116	1.033
21001121	1.090
21001122	1.076
21001123	1.127
21001124	1.083
21001125	1.055
21001126	1.035
21001211	1.022
21001212	1.040
21001213	1.029
21001214	0.989
21001215	0.992
21001216	0.988
21001221	1.037
21001222	0.984
21001223	1.010

Stratum code	Factor
21001224	0.969
21001225	0.986
21001226	0.989
21003111	1.002
21003112	0.970
21003113	1.034
21003114	1.003
21003115	0.969
21003116	0.984
21003121	0.991
21003122	0.997
21003123	1.001
21003124	1.008
21003125	0.985
21003126	0.959
21003211	1.024
21003212	0.956
21003213	1.013
21003214	1.020
21003215	0.998
21003216	0.982
21003221	1.005
21003222	0.995
21003223	1.049
21003224	0.987
21003225	0.991
21003226	0.979
22001011	1.127
22001012	1.031
22001013	1.129
22001014	1.142
22001015	1.103
22001016	0.057
22001021	1.157

Stratum code	Factor
22001022	1.080
22001023	1.140
22001024	1.071
22001025	1.074
22001026	1.058
22003011	0.991
22003012	0.989
22003013	1.037
22003014	1.022
22003015	1.017
22003016	0.975
22003021	1.008
22003022	0.968
22003023	1.002
22003024	0.993
22003025	1.009
22003026	0.974
23002011	1.010
23002012	1.021
23002013	1.071
23002014	1.022
23002015	1.008
23002016	0.972
23002021	1.024
23002022	0.976
23002023	1.008
23002024	1.055
23002025	1.010
23002026	0.995
24003011	1.053
24003012	0.991
24003013	1.020
24003014	1.012
24003015	0.996

Stratum code	Factor
24003016	0.981
24003021	1.017
24003022	1.006
24003023	1.057
24003024	0.991
24003025	0.979
24003026	0.978
24505011	1.071
24505012	1.057
24505013	1.115
24505014	1.095
24505015	1.060
24505016	1.060
24505021	1.108
24505022	1.032
24505023	1.063
24505024	1.085
24505025	1.057
24505026	1.014
25003011	1.009
25003012	0.983
25003013	1.037
25003014	1.031
25003015	0.981
25003016	0.971
25003021	1.029
25003022	1.018
25003023	1.033
25003024	1.002
25003025	0.983
25003026	0.973
26003011	1.018
26003012	0.990
26003013	1.040

Stratum code	Factor
26003014	0.994
26003015	0.991
26003016	0.984
26003021	1.003
26003022	0.978
26003023	0.999
26003024	1.011
26003025	0.994
26003026	0.984
28003011	1.015
28003012	0.967
28003013	1.017
28003014	1.030
28003015	1.006
28003016	0.991
28003021	1.061
28003022	0.975
28003023	1.016
28003024	0.998
28003025	0.992
28003026	0.984
29003011	1.014
29003012	0.991
29003013	1.042
29003014	1.019
29003015	0.993
29003016	1.001
29003021	1.009
29003022	0.999
29003023	1.041
29003024	1.017
29003025	0.982
29003026	0.986
29995011	1.071

Stratum code	Factor
29995012	1.048
29995013	1.067
29995014	1.074
29995015	1.037
29995016	1.033
29995021	1.055
29995022	1.045
29995023	1.054
29995024	1.068
29995025	1.054
29995026	1.039
31001111	1.133
31001112	1.102
31001113	1.106
31001114	1.131
31001115	1.076
31001116	1.086
31001121	1.155
31001122	1.096
31001123	1.105
31001124	1.069
31001125	1.067
31001126	1.037
31001211	1.066
31001212	1.017
31001213	1.030
31001214	1.024
31001215	0.990
31001216	0.991
31001221	1.037
31001222	1.008
31001223	1.027
31001224	0.992
31001225	0.994

Stratum code	Factor
31001226	0.977
31003111	1.085
31003112	1.038
31003113	1.073
31003114	1.065
31003115	1.047
31003116	0.993
31003121	1.054
31003122	1.055
31003123	1.099
31003124	1.013
31003125	1.011
31003126	0.983
31003211	1.039
31003212	1.035
31003213	1.048
31003214	1.035
31003215	0.983
31003216	0.985
31003221	1.035
31003222	1.031
31003223	1.073
31003224	1.021
31003225	0.979
31003226	1.008
32001011	1.052
32001012	1.035
32001013	1.072
32001014	1.037
32001015	1.015
32001016	1.006
32001021	1.084
32001022	1.028
32001023	1.083

Stratum code	Factor
32001024	1.047
32001025	1.003
32001026	0.981
32003011	1.065
32003012	1.066
32003013	1.080
32003014	1.046
32003015	1.027
32003016	0.986
32003021	1.048
32003022	1.032
32003023	1.039
32003024	1.007
32003025	0.987
32003026	0.998
33002011	1.106
33002012	1.064
33002013	1.101
33002014	1.088
33002015	1.005
33002016	0.985
33002021	1.101
33002022	1.056
33002023	1.091
33002024	1.065
33002025	0.984
33002026	0.984
35001011	1.042
35001012	1.012
35001013	1.034
35001014	1.007
35001015	0.996
35001016	0.990
35001021	1.040

Stratum code	Factor
35001022	1.012
35001023	1.045
35001024	1.017
35001025	1.007
35001026	0.986
35003011	1.030
35003012	0.997
35003013	1.032
35003014	1.008
35003015	0.982
35003016	0.985
35003021	1.036
35003022	1.015
35003023	1.035
35003024	0.995
35003025	0.975
35003026	0.983
36001011	1.074
36001012	1.033
36001013	1.034
36001014	1.044
36001015	1.018
36001016	1.003
36001021	1.035
36001022	1.043
36001023	1.051
36001024	1.042
36001025	1.010
36001026	1.001
36003011	1.052
36003012	1.007
36003013	1.039
36003014	1.042
36003015	0.991

Stratum code	Factor
36003016	0.992
36003021	1.069
36003022	1.062
36003023	1.038
36003024	1.043
36003025	1.028
36003026	0.994
37892011	1.030
37892012	1.083
37892013	1.133
37892014	1.074
37892015	1.007
37892016	1.017
37892021	1.090
37892022	1.021
37892023	1.068
37892024	1.059
37892025	0.994
37892026	0.971
38001011	1.025
38001012	1.001
38001013	1.023
38001014	1.033
38001015	1.023
38001016	0.984
38001021	1.057
38001022	1.015
38001023	1.048
38001024	1.021
38001025	0.953
38001026	0.963
38003011	1.058
38003012	1.015
38003013	1.066

Stratum code	Factor
38003014	1.020
38003015	1.000
38003016	0.981
38003021	1.046
38003022	1.010
38003023	1.026
38003024	1.007
38003025	0.995
38003026	0.979
39001011	1.057
39001012	1.039
39001013	1.021
39001014	1.039
39001015	1.023
39001016	0.981
39001021	1.071
39001022	1.045
39001023	1.045
39001024	0.999
39001025	0.994
39001026	0.979
39003011	1.047
39003012	1.014
39003013	1.063
39003014	1.035
39003015	1.002
39003016	0.994
39003021	1.058
39003022	1.045
39003023	1.060
39003024	1.022
39003025	1.022
39003026	0.997
41003111	1.084

Stratum code	Factor
41003112	1.074
41003113	1.056
41003114	1.078
41003115	1.015
41003116	0.989
41003121	1.075
41003122	1.050
41003123	1.042
41003124	1.062
41003125	1.025
41003126	0.982
41003211	1.045
41003212	1.032
41003213	1.042
41003214	1.043
41003215	1.011
41003216	0.994
41003221	1.065
41003222	1.028
41003223	1.064
41003224	1.038
41003225	1.006
41003226	1.001
42003011	1.075
42003012	1.018
42003013	1.072
42003014	1.042
42003015	1.002
42003016	0.996
42003021	1.036
42003022	1.055
42003023	1.058
42003024	1.020
42003025	0.987

Stratum code	Factor
42003026	0.975
43005011	1.093
43005012	1.075
43005013	1.090
43005014	1.085
43005015	1.055
43005016	1.009
43005021	1.116
43005022	1.041
43005023	1.083
43005024	1.043
43005025	1.003
43005026	0.987
47003011	1.041
47003012	1.023
47003013	1.043
47003014	1.042
47003015	1.002
47003016	0.987
47003021	1.051
47003022	1.024
47003023	1.050
47003024	1.015
47003025	1.007
47003026	0.990
47895011	1.062
47895012	1.008
47895013	1.020
47895014	1.042
47895015	1.004
47895016	0.999
47895021	1.050
47895022	1.011
47895023	1.038

Stratum code	Factor
47895024	1.027
47895025	1.004
47895026	0.975
48003011	1.039
48003012	1.029
48003013	1.053
48003014	1.020
48003015	1.003
48003016	0.996
48003021	1.048
48003022	1.017
48003023	1.032
48003024	1.014
48003025	0.988
48003026	1.004
49003011	1.032
49003012	1.021
49003013	1.066
49003014	1.012
49003015	0.990
49003016	0.998
49003021	1.032
49003022	1.016
49003023	1.060
49003024	1.010
49003025	0.987
49003026	1.010
50001011	1.098
50001012	1.081
50001013	1.096
50001014	1.072
50001015	1.042
50001016	1.020
50001021	1.104

Stratum code	Factor
50001022	1.057
50001023	1.117
50001024	1.058
50001025	1.022
50001026	0.995
50002011	1.088
50002012	1.044
50002013	1.143
50002014	1.063
50002015	1.014
50002016	0.963
50002021	1.128
50002022	1.079
50002023	1.105
50002024	1.043
50002025	0.992
50002026	0.958
50003111	1.058
50003112	1.050
50003113	1.073
50003114	1.060
50003115	1.035
50003116	1.008
50003121	1.080
50003122	1.043
50003123	1.053
50003124	1.019
50003125	1.028
50003126	0.990
50003211	1.033
50003212	1.004
50003213	1.054
50003214	1.020
50003215	1.017

Stratum code	Factor
50003216	0.977
50003221	1.033
50003222	1.019
50003223	1.027
50003224	1.025
50003225	0.997
50003226	0.999
51003111	1.041
51003112	1.038
51003113	1.027
51003114	1.032
51003115	1.014
51003116	0.982
51003121	1.059
51003122	1.039
51003123	1.069
51003124	1.028
51003125	0.999
51003126	0.980
51003211	1.032
51003212	1.014
51003213	1.039
51003214	1.012
51003215	0.994
51003216	0.984
51003221	1.027
51003222	1.011
51003223	1.041
51003224	1.005
51003225	0.994
51003226	0.985
52003011	1.053
52003012	1.034
52003013	1.056

Stratum code	Factor
52003014	1.038
52003015	1.003
52003016	0.995
52003021	1.045
52003022	1.017
52003023	1.053
52003024	1.027
52003025	0.994
52003026	0.988
53001011	1.079
53001012	1.034
53001013	1.099
53001014	1.057
53001015	1.032
53001016	1.001
53001021	1.089
53001022	1.047
53001023	1.074
53001024	1.045
53001025	0.989
53001026	0.997
53002011	1.065
53002012	1.037
53002013	1.051
53002014	1.033
53002015	0.974
53002016	0.970
53002021	1.095
53002022	1.023
53002023	1.094
53002024	1.048
53002025	0.971
53002026	0.979
57003011	1.044

Stratum code	Factor
57003012	1.043
57003013	1.050
57003014	1.024
57003015	0.999
57003016	0.989
57003021	1.033
57003022	1.032
57003023	1.048
57003024	1.030
57003025	0.993
57003026	0.971
57891011	1.069
57891012	1.016
57891013	1.041
57891014	1.033
57891015	1.004
57891016	0.988
57891021	1.032
57891022	1.003
57891023	1.060
57891024	1.013
57891025	0.992
57891026	0.985
57892011	1.056
57892012	1.058
57892013	1.077
57892014	1.065
57892015	1.047
57892016	1.002
57892021	1.081
57892022	1.047
57892023	1.059
57892024	1.043
57892025	1.011

Stratum code	Factor
57892026	1.015
58003011	1.027
58003012	0.994
58003013	1.048
58003014	1.030
58003015	0.999
58003016	0.978
58003021	1.027
58003022	1.021
58003023	1.062
58003024	1.013
58003025	0.993
58003026	0.969
59003011	1.052
59003012	1.032
59003013	1.029
59003014	1.019
59003015	1.014
59003016	0.990
59003021	1.043
59003022	1.016
59003023	1.043
59003024	1.034
59003025	1.006
59003026	0.983
60001111	1.131
60001112	1.031
60001113	1.067
60001114	1.081
60001115	1.042
60001116	0.984
60001121	1.112
60001122	1.061
60001123	1.106

Stratum code	Factor
60001124	1.020
60001125	1.004
60001126	0.954
60001211	1.047
60001212	1.001
60001213	1.042
60001214	1.039
60001215	1.015
60001216	1.029
60001221	1.050
60001222	1.040
60001223	1.033
60001224	1.007
60001225	0.994
60001226	0.975
60003111	1.016
60003112	1.021
60003113	1.087
60003114	1.093
60003115	1.108
60003116	1.028
60003121	1.111
60003122	1.052
60003123	1.123
60003124	0.989
60003125	1.017
60003126	0.924
60003211	1.021
60003212	1.010
60003213	1.001
60003214	1.027
60003215	1.016
60003216	1.005
60003221	1.047

Stratum code	Factor
60003222	1.005
60003223	1.031
60003224	1.000
60003225	1.000
60003226	1.000
60102011	0.958
60102012	1.005
60102013	1.000
60102014	1.026
60102015	0.991
60102016	0.998
60102021	0.993
60102022	0.989
60102023	0.966
60102024	0.957
60102025	0.936
60102026	0.963
61001111	1.042
61001112	1.003
61001113	1.100
61001114	1.052
61001115	1.034
61001116	0.999
61001121	1.086
61001122	1.072
61001123	1.058
61001124	1.047
61001125	0.994
61001126	0.955
61001211	1.091
61001212	0.983
61001213	1.025
61001214	1.026
61001215	1.006

Stratum code	Factor
61001216	1.007
61001221	1.045
61001222	1.014
61001223	1.012
61001224	1.000
61001225	0.949
61001226	0.977
61003111	1.119
61003112	0.954
61003113	0.992
61003114	1.070
61003115	1.033
61003116	0.970
61003121	1.030
61003122	0.980
61003123	1.010
61003124	0.999
61003125	0.940
61003126	0.972
61003211	0.957
61003212	0.971
61003213	1.036
61003214	1.021
61003215	0.973
61003216	0.994
61003221	0.986
61003222	0.989
61003223	1.011
61003224	1.003
61003225	1.016
61003226	1.001
62003011	1.033
62003012	0.978
62003013	1.064

Stratum code	Factor
62003014	1.019
62003015	1.016
62003016	1.020
62003021	1.022
62003022	1.012
62003023	1.032
62003024	1.032
62003025	1.002
62003026	1.008
62705011	1.088
62705012	1.054
62705013	1.090
62705014	1.062
62705015	1.021
62705016	1.006
62705021	1.095
62705022	1.066
62705023	1.074
62705024	1.030
62705025	1.024
62705026	1.002
65003011	1.017
65003012	0.999
65003013	1.030
65003014	1.014
65003015	1.002
65003016	1.003
65003021	1.011
65003022	1.012
65003023	1.008
65003024	0.995
65003025	0.992
65003026	0.997
66003011	1.017

Stratum code	Factor
66003012	0.988
66003013	1.023
66003014	1.034
66003015	0.999
66003016	0.972
66003021	1.013
66003022	1.008
66003023	1.000
66003024	1.018
66003025	0.978
66003026	1.002
68003011	1.005
68003012	0.977
68003013	1.028
68003014	1.008
68003015	1.008
68003016	0.997
68003021	1.003
68003022	1.005
68003023	1.019
68003024	0.997
68003025	0.988
68003026	0.987
69003011	0.991
69003012	0.981
69003013	1.019
69003014	0.987
69003015	0.986
69003016	0.997
69003021	0.984
69003022	0.981
69003023	1.014
69003024	0.982
69003025	0.982

Stratum code	Factor
69003026	0.995
71003111	1.064
71003112	0.995
71003113	1.107
71003114	1.054
71003115	1.041
71003116	0.997
71003121	1.007
71003122	1.015
71003123	1.012
71003124	0.981
71003125	0.996
71003126	0.940
71003211	0.987
71003212	0.980
71003213	1.021
71003214	0.992
71003215	0.996
71003216	0.981
71003221	1.005
71003222	1.026
71003223	1.004
71003224	0.994
71003225	1.000
71003226	0.988
71005011	1.110
71005012	1.030
71005013	1.080
71005014	1.049
71005015	1.037
71005016	1.011
71005021	1.095
71005022	1.072
71005023	1.077

Stratum code	Factor
71005024	1.035
71005025	1.022
71005026	1.009
72003011	1.003
72003012	1.006
72003013	1.060
72003014	1.011
72003015	1.003
72003016	1.010
72003021	1.038
72003022	0.990
72003023	1.067
72003024	1.007
72003025	1.001
72003026	1.014
72505011	1.116
72505012	1.045
72505013	1.101
72505014	1.091
72505015	1.038
72505016	1.021
72505021	1.114
72505022	1.068
72505023	1.084
72505024	1.091
72505025	1.027
72505026	1.023
75003011	1.011
75003012	1.013
75003013	1.028
75003014	1.006
75003015	1.001
75003016	0.999
75003021	1.025

Stratum code	Factor
75003022	0.990
75003023	1.027
75003024	0.993
75003025	1.003
75003026	0.996
76003011	1.030
76003012	0.988
76003013	1.056
76003014	1.022
76003015	1.002
76003016	1.021
76003021	1.023
76003022	1.028
76003023	1.020
76003024	1.007
76003025	1.000
76003026	1.021
78003011	1.003
78003012	0.985
78003013	1.023
78003014	1.025
78003015	1.008
78003016	1.001
78003021	1.041
78003022	0.987
78003023	1.016
78003024	1.016
78003025	0.997
78003026	0.981
79003011	1.013
79003012	0.995
79003013	1.041
79003014	0.999
79003015	0.993

Stratum code	Factor
79003016	1.001
79003021	1.010
79003022	1.000
79003023	1.015
79003024	0.994
79003025	1.001
79003026	0.997
79995011	1.077
79995012	1.007
79995013	1.082
79995014	1.065
79995015	1.033
79995016	1.021
79995021	1.069
79995022	1.026
79995023	1.725
79995024	1.048
79995025	1.027
79995026	0.989
81003111	1.034
81003112	1.035
81003113	1.123
81003114	1.086
81003115	1.041
81003116	0.990
81003121	1.041
81003122	1.061
81003123	1.060
81003124	1.019
81003125	0.977
81003126	1.013
81003211	1.031
81003212	1.021
81003213	1.035

Stratum code	Factor
81003214	1.020
81003215	1.002
81003216	0.986
81003221	1.031
81003222	1.020
81003223	1.045
81003224	1.003
81003225	0.990
81003226	0.980
82003011	1.017
82003012	1.017
82003013	1.071
82003014	1.014
82003015	0.978
82003016	0.975
82003021	1.030
82003022	1.021
82003023	1.064
82003024	0.998
82003025	0.987
82003026	0.982
83005011	1.066
83005012	1.023
83005013	1.107
83005014	1.063
83005015	1.027
83005016	1.005
83005021	1.058
83005022	1.055
83005023	1.077
83005024	1.025
83005025	0.973
83005026	1.004
87003011	1.022

Stratum code	Factor
87003012	1.008
87003013	1.076
87003014	1.023
87003015	0.988
87003016	0.986
87003021	1.026
87003022	0.984
87003023	1.022
87003024	1.000
87003025	0.971
87003026	0.985
88003011	1.021
88003012	1.032
88003013	1.059
88003014	1.026
88003015	0.990
88003016	0.993
88003021	1.036
88003022	1.028
88003023	1.036
88003024	0.996
88003025	0.971
88003026	0.995
89003011	1.050
89003012	1.027
89003013	1.077
89003014	1.036
89003015	1.031
89003016	1.003
89003021	1.046
89003022	1.049
89003023	1.041
89003024	1.024
89003025	1.017

Stratum code	Factor
89003026	1.014
89995011	1.110
89995012	1.076
89995013	1.123
89995014	1.070
89995015	1.039
89995016	1.062
89995021	1.106
89995022	1.084
89995023	1.105
89995024	1.057
89995025	1.076
89995026	1.049
90003111	1.043
90003112	1.076
90003113	1.098
90003114	1.094
90003115	1.004
90003116	0.963
90003121	1.047
90003122	1.056
90003123	1.089
90003124	1.014
90003125	1.015
90003126	0.977
90003211	1.017
90003212	1.043
90003213	1.022
90003214	1.011
90003215	1.000
90003216	1.012
90003221	1.037
90003222	1.041
90003223	1.019

Stratum code	Factor
90003224	1.031
90003225	1.000
90003226	0.995
90301111	1.142
90301112	1.075
90301113	1.115
90301114	1.124
90301115	1.127
90301116	0.971
90301121	1.105
90301122	1.020
90301123	1.089
90301124	1.008
90301125	0.971
90301126	0.960
90301211	1.160
90301212	1.056
90301213	1.128
90301214	1.116
90301215	1.094
90301216	1.013
90301221	1.132
90301222	1.070
90301223	1.108
90301224	1.074
90301225	1.042
90301226	1.054
90302111	1.093
90302112	1.055
90302113	1.159
90302114	1.095
90302115	1.088
90302116	0.992
90302121	1.055

Stratum code	Factor
90302122	1.080
90302123	1.106
90302124	1.035
90302125	1.030
90302126	1.007
90302211	1.052
90302212	1.000
90302213	1.042
90302214	1.004
90302215	0.990
90302216	0.990
90302221	1.029
90302222	1.016
90302223	1.094
90302224	1.025
90302225	0.971
90302226	0.995
90304111	1.047
90304112	1.053
90304113	1.147
90304114	1.090
90304115	1.074
90304116	1.046
90304121	1.069
90304122	1.060
90304123	1.068
90304124	1.074
90304125	0.981
90304126	1.057
90304211	1.076
90304212	1.052
90304213	1.071
90304214	1.065
90304215	1.028

Stratum code	Factor
90304216	1.029
90304221	1.070
90304222	1.072
90304223	1.079
90304224	1.026
90304225	1.033
90304226	1.029
91003111	1.035
91003112	1.045
91003113	1.112
91003114	1.073
91003115	1.020
91003116	0.986
91003121	1.000
91003122	1.033
91003123	1.045
91003124	1.020
91003125	0.947
91003126	0.959
91003211	1.025
91003212	0.978
91003213	1.017
91003214	1.020
91003215	1.004
91003216	0.999
91003221	1.038
91003222	1.030
91003223	1.092
91003224	1.023
91003225	1.001
91003226	0.988
92003011	1.041
92003012	1.005
92003013	1.070

Stratum code	Factor
92003014	1.016
92003015	0.992
92003016	0.983
92003021	0.987
92003022	1.011
92003023	1.028
92003024	1.010
92003025	0.985
92003026	0.973
95003011	1.028
95003012	0.995
95003013	1.050
95003014	0.971
95003015	1.001
95003016	0.979
95003021	1.051
95003022	1.002
95003023	1.029
95003024	0.995
95003025	0.987
95003026	0.967
96003011	1.026
96003012	1.039
96003013	1.014
96003014	1.018
96003015	1.070
96003016	1.002
96003021	1.043
96003022	1.108
96003023	1.065
96003024	1.030
96003025	1.010
96003026	0.976
97001011	1.251

Stratum code	Factor
97001012	1.235
97001013	1.250
97001014	1.278
97001015	1.180
97001016	1.117
97001021	1.199
97001022	1.158
97001023	1.182
97001024	1.136
97001025	1.111
97001026	1.112
97002011	1.092
97002012	1.084
97002013	1.088
97002014	1.085
97002015	1.048
97002016	1.014
97002021	1.088
97002022	1.071
97002023	1.079
97002024	1.052
97002025	1.061
97002026	1.018
97004011	1.026
97004012	0.992
97004013	1.048
97004014	1.009
97004015	0.993
97004016	0.963
97004021	1.063
97004022	0.990
97004023	1.053
97004024	1.011
97004025	0.932

Stratum code	Factor
97004026	0.974
98003011	1.044
98003012	1.027
98003013	1.053
98003014	1.009
98003015	0.996
98003016	0.967
98003021	1.052
98003022	1.024
98003023	1.045
98003024	1.010
98003025	0.994
98003026	1.009
98904011	0.995
98904012	1.008
98904013	1.033
98904014	1.029
98904015	0.985
98904016	0.973
98904021	0.996
98904022	1.013
98904023	1.025
98904024	1.008
98904025	0.985
98904026	0.942
99003011	1.028
99003012	1.036
99003013	1.043
99003014	1.024
99003015	1.005
99003016	0.994
99003021	1.029
99003022	1.020
99003023	1.048

Stratum code	Factor
99003024	1.019
99003025	1.016
99003026	0.996

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[1] See Attachment 2 for description of post stratum codes.

[FR Doc. 91-17202 Filed 7-16-91; 10:20 am]

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

93-6183

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4 day of January, one thousand nine hundred and ninety-five.

CITY OF NY, STATE OF NY, CITY OF LOS ANGELES, CITY OF CHICAGO, DADE COUNTY, CITY OF HOUSTON, FLORIDA, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, LEAGUE OF UNITED NATION AMERICAN CITIZENS, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MARCELLA MAXWELL, DONALD H. ELLIOTT, JOHN MACK, OLGA MORALES, TIMOTHY W. WRIGHT, III, RAYMOND G. ROMERO, ANTONIO GONZALES, ATHALIE RANGE, JERRY ALAN WOOD, CAROLYN SUE LOPEZ, CITY OF ATLANTA, GEORGIA, MAYNARD JACKSON, INDIVIDUALLY, AND AS THE MAYOR OF THE CITY OF ATLANTA, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA STATE CONFERENCE, MIGUEL A. DE GRANDY, WILLYE DENNIS, MARIO DIAZ-BALART, DR. CHARLES EVANS, RODOLFO GARCIA, JR., BOLLOWY L. "BO" JOHNSON, ALFRED J. LAWSON, JR., WILLIS LOGAN, JR., JOHNNIE

MCMILLAN, ALZO J. REDDICK, PETER RUDY WALLACE and T.K. WETHERELL,

Plaintiffs-Appellants,

STATE OF TEXAS, CITY OF PHOENIX, ARIZONA, STATE OF NEW JERSEY, STATE OF FLORIDA, CITY OF CLEVELAND, OHIO, CITY OF DENVER, COLORADO, CITY OF INGLEWOOD, CALIFORNIA, CITY OF NEW ORLEANS, LOUISIANA, CITY OF OAKLAND, CALIFORNIA, CITY OF PASADENA, CALIFORNIA, CITY OF PHILADELPHIA, PENNSYLVANIA, CITY OF SAN ANTONIO, TEXAS, CITY OF SAN FRANCISCO, CALIFORNIA, BROWARD COUNTY, FLORIDA, STATE OF ARIZONA, CITY OF BALTIMORE, MARYLAND, CITY OF BOSTON, MASSACHUSETTS, CITY OF LONG BEACH, CALIFORNIA, CITY OF SAN JOSE, CALIFORNIA, LOS ANGELES COUNTY, CALIFORNIA, SAN BERNADINO COUNTY, CALIFORNIA, DISTRICT OF COLUMBIA, NAVAJO NATION, STATE OF NEW MEXICO, CITY OF TUCSON, ARIZONA and COUNCIL OF GREAT CITY SCHOOLS,

Intervenors-Plaintiffs-Appellants,

PEOPLE OF THE STATE OF CALIFORNIA EX REEL DANIEL E. LUNGREN,

Plaintiff,

COUNTY OF HUDSON, NEW JERSEY,

Intervenor-Plaintiff,

v.

UNITED STATES DEPARTMENT OF COMMERCE, RONALD H. BROWN, ESQ. AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE, MICHAEL R. DARBY, AS UNDER SECRETARY FOR ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, BARBARA EVERITT BRYANT, AS DIRECTOR OF THE BUREAU OF CENSUS, WILLIAM J. CLINTON, AS PRESIDENT OF THE UNITED STATES, DONALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, MICHAEL ESPY, AS SECRETARY OF AGRICULTURE, DONNA E. SHALALA, AS SECRETARY OF HOUSING & URBAN DEVELOPMENT, ROBERT B. REICH, AS SECRETARY OF LABOR, FREDERICO PENA, AS SECRETARY OF TRANSPORTATION and RICHARD W. RILEY, AS SECRETARY OF EDUCATION,

Defendants-Appellees,

STATE OF WISCONSIN and STATE OF OKLAHOMA,

Intervenors-Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by Appellant STATE OF WISCONSIN

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:

FOR THE COURT.
GEORGE LANGE III. Clerk
By: /s/
Kathy Brouwer, Operations Mgr.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

93-6183

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of December, one thousand nine hundred and ninety-four.

CITY OF NY, STATE OF NY, CITY OF LOS ANGELES, CITY OF CHICAGO, DADE COUNTY, CITY OF HOUSTON, FLORIDA, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, LEAGUE OF UNITED NATION AMERICAN CITIZENS, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MARCELLA MAXWELL, DONALD H. ELLIOTT, JOHN MACK, OLGA MORALES, TIMOTHY W. WRIGHT, III, RAYMOND G. ROMERO, ANTONIO GONZALES, ATHALIE RANGE, JERRY ALAN WOOD, CAROLYN SUE LOPEZ, CITY OF ATLANTA, GEORGIA, MAYNARD JACKSON, INDIVIDUALLY, AND AS THE MAYOR OF THE CITY OF ATLANTA, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA STATE CONFERENCE, MIGUEL A. DE GRANDY, WILLYE DENNIS, MARIO DIAZ-BALART, DR. CHARLES EVANS, RODOLFO GARCIA, JR., BOLLOWY L. "BO" JOHNSON, ALFRED J. LAWSON, JR., WILLIS LOGAN, JR., JOHNNIE

MCMILLAN, ALZO J. REDDICK, PETER RUDY WALLACE and T.K. WETHERELL,

Plaintiffs-Appellants,

STATE OF TEXAS, CITY OF PHOENIX, ARIZONA, STATE OF NEW JERSEY, STATE OF FLORIDA, CITY OF CLEVELAND, OHIO, CITY OF DENVER, COLORADO, CITY OF INGLEWOOD, CALIFORNIA, CITY OF NEW ORLEANS, LOUISIANA, CITY OF OAKLAND, CALIFORNIA, CITY OF PASADENA, CALIFORNIA, CITY OF PHILADELPHIA, PENNSYLVANIA, CITY OF SAN ANTONIO, TEXAS, CITY OF SAN FRANCISCO, CALIFORNIA, BROWARD COUNTY, FLORIDA, STATE OF ARIZONA, CITY OF BALTIMORE, MARYLAND, CITY OF BOSTON, MASSACHUSETTS, CITY OF LONG BEACH, CALIFORNIA, CITY OF SAN JOSE, CALIFORNIA, LOS ANGELES COUNTY, CALIFORNIA, SAN BERNADINO COUNTY, CALIFORNIA, DISTRICT OF COLUMBIA, NAVAJO NATION, STATE OF NEW MEXICO, CITY OF TUCSON, ARIZONA and COUNCIL OF GREAT CITY SCHOOLS,

Intervenors-Plaintiffs-Appellants,

PEOPLE OF THE STATE OF CALIFORNIA EX REEL DANIEL E. LUNGREN,

Plaintiff,

COUNTY OF HUDSON, NEW JERSEY,

Intervenor-Plaintiff,

v.

UNITED STATES DEPARTMENT OF COMMERCE, RONALD H. BROWN, ESQ. AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE, MICHAEL R. DARBY, AS UNDER SECRETARY FOR ECONOMIC AFFAIRS OF THE UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, BARBARA EVERITT BRYANT, AS DIRECTOR OF THE BUREAU OF CENSUS, WILLIAM J. CLINTON, AS PRESIDENT OF THE UNITED STATES, DONALD K. ANDERSON, AS CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, MICHAEL ESPY, AS SECRETARY OF AGRICULTURE, DONNA E. SHALALA, AS SECRETARY OF HOUSING & URBAN DEVELOPMENT, ROBERT B. REICH, AS SECRETARY OF LABOR, FREDERICO PENA, AS SECRETARY OF TRANSPORTATION and RICHARD W. RILEY, AS SECRETARY OF EDUCATION,

Defendants-Appellees,

STATE OF WISCONSIN and STATE OF OKLAHOMA,

Intervenors-Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by Appellee STATE OF OKLAHOMA on September 21, 1994

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk
By: /s/
Carolyn Clark Campbell
Chief Deputy Clerk

Supreme Court, U.S.
FILED
JUN 30 1995
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-1614 (5)
STATE OF WISCONSIN, Petitioner
v.
CITY OF NEW YORK, et al., Respondents.

No. 94-1631 (4)
STATE OF OKLAHOMA, Petitioner
v.
CITY OF NEW YORK, et al., Respondents.

No. 94-1985 (3)
UNITED STATES DEPARTMENT OF COMMERCE, et al., Petitioners
v.
CITY OF NEW YORK, et al., Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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July 3, 1995

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73 pp

(Continuation of Cover Page)

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(Continuation of Cover Page)

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COUNTER-STATEMENT OF QUESTION PRESENTED

After determining that plaintiffs had proved by conclusive evidence that (a) adjusted census data prepared by the Bureau of the Census would increase the accuracy of the census and (b) the decision of the Secretary of Commerce rejecting use of those data did not reflect a good-faith effort to render a census as accurate as practicable, the court of appeals remanded the case to the district court to give the Secretary an opportunity to show that his decision against adjustment was essential to achievement of a legitimate governmental objective. The question presented is whether this Court should grant interlocutory review of the court of appeals' order before the factual record is complete, before either court below has determined the Secretary's decision to be unconstitutional and before either court has considered an appropriate remedy.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-1614
STATE OF WISCONSIN, Petitioner
v.
CITY OF NEW YORK, et al., Respondents.

No. 94-1631
STATE OF OKLAHOMA, Petitioner
v.
CITY OF NEW YORK, et al., Respondents.

No. 94-1985
UNITED STATES DEPARTMENT OF COMMERCE, et al., Petitioners
v.
CITY OF NEW YORK, et al., Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents the City of New York, the State of New York, the State of Texas, the City of Los Angeles, the City of San Francisco, the City of San Jose, the City of

Tucson, the City of Long Beach, the City of Pasadena, the City of Inglewood, the County of Los Angeles, the County of Broward and the Navajo Nation respectfully request that the petitions for writs of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in Nos. 94-1614, 94-1631 and 94-1985[1] be denied.

Preliminary Statement

The 1990 decennial census, as reported by the United States Department of Commerce ("Department"), reflected an undercount of the national population. Not all

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[1] The petition in No. 94-1614, State of Wisconsin v. City of New York, et al. ("Wisc. Pet."), was filed by the State of Wisconsin on April 3, 1995. The petition in No. 94-1631, State of Oklahoma v. City of New York, et al. ("Okla. Pet."), was filed by the State of Oklahoma on April 4, 1995. The petition in No. 94-1985, United States Department of Commerce, et al. v. City of New York, et al. ("U.S. Pet."), was filed by the United States on June 5, 1995. Upon application, the Clerk of the Court on April 24, 1995 extended the time of respondents to file a brief in opposition to all petitions to and including May 31, 1995 and, upon further application, on June 1, 1995 extended that time to and including July 3, 1995.

areas or groups of Americans were equally affected: as in previous censuses, the undercount was differentially severe among members of racial and ethnic minorities.

Having anticipated, based on its experience with previous censuses, that a differential undercount would occur in the 1990 census and recognizing that a differential undercount undermines the accuracy of census data when used to allocate political representation or government funds, the Bureau of the Census ("Bureau") designed and executed, as part of the 1990 census, procedures that would have permitted a statistical adjustment of the census to correct for the differential undercount. The Bureau prepared and reviewed adjusted census data that, in the Bureau's analysis, ameliorated the differential undercount.

In June 1991 the Bureau concluded that the adjusted census data were more accurate than the unadjusted counts, and the Director of the Bureau recommended to the

Secretary of Commerce ("Secretary") that the 1990 census be adjusted on the basis of the data the Bureau had prepared. In July 1991 the Secretary issued a formal decision rejecting the recommendation of the Bureau's director that the census be adjusted, as well as the Bureau's expert judgment that the adjusted data had been shown to be more accurate.

Plaintiffs challenged the Secretary's decision, alleging that, as the Bureau had concluded, the adjusted data had been clearly shown to be more accurate, that the Secretary's contrary determination had not been made in good faith, and that as a consequence residents of adversely affected jurisdictions were being denied the political representation to which they were entitled, a claim of constitutional dimension. After extensive discovery and a 13-day trial, the district court found that plaintiffs had shown the adjusted data to be more accurate; but, having

concluded that it was empowered to conduct only a limited review of the Secretary's decision, the court entered judgment for defendants because the Secretary's decision was not "so beyond the pale of reason as to be arbitrary or capricious."

On appeal, plaintiffs argued that, in light of the constitutional claim presented, the district court should have reviewed the Secretary's decision de novo. The court of appeals rejected that argument. But, following the teachings of this Court on the standard of review for governmental decisions determining the allocation of political representation and the conduct of the census, the court of appeals concluded that the Secretary's decision should have been subject to a higher level of scrutiny than that applied by the district court. Upon plaintiffs' showing that the adjusted census data were more accurate and that the Secretary's decision against adjustment was not made in

good faith, the court of appeals held, the burden of proof shifted to the Secretary to show that use of the unadjusted count as the census was essential to the achievement of a legitimate governmental objective. The court of appeals vacated the judgment of the district court and remanded for further proceedings.

Petitioners now seek review of that interlocutory order. The petitions fail, however, to show the existence of such unusual circumstances as would warrant issuance of writs of certiorari before final judgment. The decision of the court of appeals is a straightforward application of well-established precedent from this Court. Nor is the court of appeals' decision in conflict with the decisions of two courts of appeals that, on quite different facts, rejected cases seeking to compel other adjustments of the census.

STATEMENT OF THE CASE

a. Error in the unadjusted census. Inevitably, the decennial census is subject to considerable error.[2] Appendix to Petition for Writ of Certiorari in No. 94-1614 ("Pet. App."), at 46; see also Transcript of Trial ("Tr."), at 80-88. For the 1990 census the Bureau has estimated that the unadjusted census counts reflect 25 million, and perhaps as many as 32 million, errors involving erroneous inclusion or exclusion of persons: persons counted who should not have been or counted two or more times ("erroneous enumerations") and persons not included who should have been ("gross omissions"). Pet. App. 259; see also Tr. 83-84. For any given block, the census count is

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[2] For a historical account of census-taking in the United States, including efforts to deal with census error, see M. Anderson, The American Census: A Social History (1988). For a summary of recent research and planning for 2000, see National Research Council, Modernizing the U.S. Census (1995).

not, and is not meant to be, especially reliable. Tr. 1315-1316.

"Net undercount" in the census is the difference between gross omissions and erroneous enumerations. Pet. App. 49, 261; Tr. 89-92. Where net undercount is differentially distributed geographically, it systematically compromises the accuracy of census data for allocating electoral representation and funding. The most serious systematic error affecting the decennial census is the differential undercounting of members of minority groups. Pet. App. 49-50. For the 1990 census, the undercount rate for blacks was 4.8%, for Hispanics 5.2%, for Asian/Pacific Islanders 3.1% and for American Indians 5.0%. Pet. App. 50. On any estimate of the net national undercount, those rates significantly exceed the average undercount rate for the American population. Taking the Department's current estimate, the undercount rate for blacks was three times the

national average, undercount rates for Hispanics and American Islanders were even worse, and the undercount rate for Asian/Pacific Islanders was nearly twice that of the nation as a whole. Because members of minority groups are not evenly distributed geographically, the consequence of the differential undercount is that areas in which members of minority groups are concentrated are systematically deprived of political representation and funding they would otherwise have received. Pet. App. 46, 50; Tr. 92, 1197-1198.

b. Development of the Post-Enumeration Survey. The problem of differential undercount in the 1990 census was neither new nor unexpected. By the 1950's, the Bureau and academic researchers had developed reliable techniques of demographic analysis (monitoring national population change through records of births, deaths, immigration and emigration) and were able to confirm

differential undercounts of blacks in the 1940 and 1950 decennial censuses. Pet. App. 39, 49-50; Tr. 496, 506. By the 1960 census, additional population research advances allowed the Bureau to begin to evaluate the census's deficiencies through "dual-system estimation " Pet. App. 7. To simplify, dual-system estimation involves the use of a second survey to assess the completeness of an original count: a sample is drawn from the population to have been counted, the percentage of the sample actually counted is determined and an estimate of undercount is made on the basis of the portion of the sample found not to have been reached. Pet. App. 51; Tr. 506-507. Dual-system estimation checks were incorporated into the 1960 and 1970 census processes; along with demographic analysis at the national level, the Bureau's dual-system estimation confirmed the persistence of differential undercounting. Pet. App. 52. In 1980 the Bureau designed and executed

the "Post-Enumeration Program" ("PEP"), a more ambitious version of the evaluative procedures that had been used to measure undercount in the previous two decennial censuses. Pet. App. 50 n.3. The PEP, like demographic analysis, showed another severely differential undercount in the 1980 census. Pet. App. 50.

Bureau personnel were troubled by the persistence of the differential undercount. To them, as to outside researchers, it had become plain that no combination of "outreach" programs and energetic canvassing would alleviate the problem. Tr. 506, 1291-1292. By 1984 the Bureau had embarked on a systematic research program to develop a more sophisticated dual-system estimation technique that would be usable not only to evaluate the extent of census coverage deficiencies but to correct them and thereby improve the accuracy of the count. Tr. 516-521. The technique, based upon improvements in the 1980

PEP, was named the "Post-Enumeration Survey" ("PES"). Tr. 1297. In congressional testimony and appearances before professional organizations in 1986 the Bureau's senior staff reported on the successes of their developing design; simultaneously, test censuses allowed the Bureau to ascertain that individual components of the PES, and the PES overall, functioned as intended. Pet. App. 50-53; Tr. 621-622, 1298-1301, 1307-1308.

c. Commencement of this litigation. Development of the PES as a technique for adjustment was retarded, however, in 1987, when the Department of Commerce intervened and announced in a press release that the 1990 census would not be statistically corrected. Pet. App. 52-53; Tr. 1326. The Department's press release was never supplemented by any formal presentation of the reasons underlying it: in broad terms, without reference to the differential undercount, the Department stated merely

that the 1990 count was expected to reach 99% of the national population. Tr. 1327-1332. The PES would still be conducted, but its sampling design would not be specifically calibrated for use in adjustment and further development of adjustment techniques would be suspended.

In November 1988 the first of the three consolidated lawsuits giving rise to the petitions was filed, City of New York, et al. v. United States Department of Commerce, et al., in the United States District Court for the Eastern District of New York. A broad coalition of state, county, city, organizational and individual plaintiffs alleged that the decision to leave the 1990 census unadjusted would predictably result in a differential undercount of members of minority groups.[3] Plaintiffs moved for a preliminary

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[3] Two other cases, initiated in 1992 in other jurisdictions, were later transferred to the United States District Court for the Eastern District of New York and consolidated with the earlier-filed action. Pet. App. 61 n.14.

injunction to ensure that, pending the outcome of the litigation, the PES would be conducted in a manner that would permit its use for adjustment.

On July 17, 1989, the day scheduled for commencement of a hearing on the motion for a preliminary injunction, defendants agreed to a stipulation under which, inter alia, the decision against adjustment was vacated and the PES restored to a size (ultimately involving a sample of approximately 400,000 Americans) that would make it usable for adjustment. Defendants also agreed to reconsider the question of adjustment with an open mind and without prejudgment, to publish guidelines that would articulate the considerations they intended to apply in deciding whether to adjust, to release uncorrected census results (if at all) only with a cautionary indication to recipients that the numbers were subject to adjustment to correct for undercounting and to appoint a special advisory panel comprising eight

members, four of whom would be selected by the Secretary from a list of seven to be proposed by plaintiffs and four of whom would be selected independently by the Secretary. Pet. App. 96-120.

In the spring of 1990 defendants promulgated guidelines in purported compliance with the 1989 stipulation. Plaintiffs challenged the guidelines on the grounds that they reflected an impermissible bias in favor of the unadjusted count, that they reflected an intention to predicate the adjustment decision on factors other than accuracy and that they failed to set forth the technical considerations (as opposed to generalized statements of policies) that defendants would weigh in their decision. The district court upheld the guidelines. Pet. App. 96-120. Limiting itself to consideration of whether the guidelines satisfied the 1989 stipulation -- i.e., forgoing consideration of whether the guidelines satisfied constitutional

requirements -- the court found that, although "[d]efendants [had] done the bare minimum" and "the issue [was] indeed close, defendants [had] satisfied their obligations thus far." Pet. App. 116.

Both the 1990 census and the PES, conducted as part of the census, took place as scheduled. As anticipated, and as discussed above, the uncorrected census was affected by a severely differential undercount.

The Bureau determined that the differential undercount in the uncorrected census could be substantially ameliorated through adjustment. Pet. App. 59. The Bureau's director, Barbara E. Bryant, formally recommended to Secretary Robert A. Mosbacher that the 1990 census be adjusted. Pet. App. 59.

d. The Secretary's decision. Secretary Mosbacher rejected that recommendation. At the outset of his decision, he acknowledged the net undercount and the

severely differential undercount in the uncorrected census. Pet. App. 138-139. The Secretary acknowledged too that the Bureau had found that adjustment would improve distributive accuracy for places containing two-thirds of the national population. Pet. App. 141-142. He conceded that "the PES was a generally high-quality survey that was well-executed" and that "[t]here is little doubt that the PES detected an overall undercount in the census and a differential undercount at the national level by race and ethnic origin." Pet. App. 169. Nonetheless, the Secretary decided against adjusting the census to correct for the differential undercount.

Proceedings Below

1. On Secretary Mosbacher's announcement of his decision, plaintiffs challenged his refusal to accept the recommended adjustment. In May 1992, after extensive discovery, the district court presided over a 13-day trial, at

which testimony was offered from 14 statisticians and demographers. Pet. App. 61.

The evidence at trial demonstrated that the Bureau's own research, which formed the basis for its director's recommendation in favor of adjustment, showed that the adjusted counts provided superior distributive (as well as numeric) accuracy. Plaintiffs demonstrated (and the point has not been contested by respondents) that adjustment would alleviate the differential undercount of minorities, improving distributive accuracy for demographic groups' shares of the population. Pet. App. 94-95; Tr. 1197-1198.

The basis for the Bureau's conclusion, and thus the heart of plaintiffs' case, included comparison of the adjusted and unadjusted data with demographic analysis, Tr. 883-895; evaluation of potential sources of error in the PES, Tr. 250-251, 646-648, 1500-1502; confirmation that patterns of undercount described by the PES corresponded

with Bureau experts' expectations, based upon decades of study of the problem of differential undercount, Tr. 645, 1543-1547; and systematic comparison of errors in the adjusted and unadjusted counts ("loss function analysis"), Tr. 596-601, 925-970.[4]

The Bureau's analyses showed that adjustment would dramatically increase the accuracy of the census. Tr. 935-970. The analyses proved that adjustment would increase numeric accuracy, of course, but, more important, they showed dramatic increases in distributive accuracy in terms of the apportionment of the House of Representatives, demographic groups as shares of the national population, states as proportions of the nation, components of states as proportions of their respective states and areas of the nation

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[4] For a general discussion of the application of loss function analysis to the decision whether to adjust the census, see C. Citro & M. Cohen (eds.), The Bicentennial Census: New Directions in Methodology for 1990 278-292 (1985) (Plaintiffs' Exhibit 2).

in various size categories as proportions of the nation. Those analyses, and testimony explaining and expanding upon them, were introduced into evidence at trial. Id.

At trial, plaintiffs also showed that the Secretary's characterization of the Bureau's analyses betrayed either a misunderstanding or misuse of the data. For example, the Secretary reported that the Bureau's analysis showed that adjustment would "worsen" accuracy for 21 states (in terms of shares of the national population) and, with a modification of the Bureau's analysis, would "worsen" accuracy for 28 or 29 states. But that report reflected two fundamental errors: the Secretary was ignoring both the magnitudes and the probabilities of the errors. Adjustment would most clearly improve distributive accuracy where it has the greatest impact, in states such as California and Wisconsin that have very large relative undercounts or overcounts. In states with small relative under- or

overcounts, i.e., where the difference between the unadjusted and the adjusted shares is small, it is less clear, but also less important, whether adjustment represents an improvement in distributive accuracy. Many of the states that the Secretary said would be "worsened" by adjustment would in fact be virtually unaffected: adjustment would have changed their shares of the national population too little for any practical impact in terms of representation, funding or anything else. Ignoring the constitutionally primary purposes of the census and the indisputable improvement in census accuracy adjustment was shown to have for those purposes, the Secretary focused on potential errors of no constitutional moment. Pet. App. 77. See Tr. 993-1075. And many of the states that the Secretary said would be "worsened" had probabilities of improvement that, though less than even, were not far from it. The Secretary ignored the fact, clearly presented in the Bureau's

analyses, that the large improvements to be achieved from adjustment were much more likely than the marginal "disimprovements." Tr. 995, 1001-1075. The Secretary also ignored the fact that the places clearly improved contained the great majority of the nation's population.[5]

Referring specifically to the Bureau's analyses (and the Secretary's interpretation of them), the district court stated, "This Court is satisfied that for most purposes the PES resulted in a more accurate -- or to be statistically fashionable, less inaccurate -- count than the original census," Pet. App. 59, and found that "plaintiffs have made a compelling attack . . ., and the Secretary has conceded that the objective criteria used to measure the adjusted counts show a greater numeric accuracy at the national level

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[5] In the court of appeals, the United States conceded the defects just mentioned in the Secretary's attempted analysis of the number of states whose shares could be expected to be improved or worsened by adjustment. Federal Appellees' Court of Appeals Brief 47 n.16.

and that the Census Bureau estimates of distributive accuracy marginally favor the adjusted counts," Pet. App. 77. The district court agreed with plaintiffs that "adjustment is statistically feasible, and would improve the quality of the counts for most purposes while ameliorating the profoundly disturbing problem of differential undercount," Pet. App. 94-95, and stated that, "were this Court called upon to decide this issue de novo, I would probably have ordered the adjustment," Pet. App. 89. But the court concluded that its role was limited to determining whether the Secretary's decision was arbitrary and capricious, Pet. App. 90-91, when measured against the Secretary's Guidelines, see Pet. App. 69. So limited, the court determined that "the Secretary's decision not to adjust is [not] so far beyond the pale of reason as to be arbitrary or capricious," Pet. App. 89. Although the court undertook no independent analysis of the constitutionality of the

Secretary's decision, the court concluded, based on its finding that the Secretary's decision was not arbitrary or capricious that the decision "does not violate the [Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA")], the Constitution, the [July 1989] Stipulation, or any statute." Pet. App. 94.

2. On appeal, plaintiffs argued that the district court had adopted the wrong standard for review of the Secretary's decision. Plaintiffs contended that the Secretary's decision affected constitutional rights, because the differential undercount had been shown to result in a malapportionment of the House of Representatives and to affect intra-state redistricting, and that the district court's deferential review of his decision was therefore erroneous. Plaintiffs argued that the district court should have reviewed the Secretary's decision de novo.

The court of appeals agreed with plaintiffs that the lower court had erred in the deference it accorded the Secretary but rejected plaintiffs' argument for de novo review. The court of appeals reasoned that, since this case involves claims that the unadjusted census deprives citizens of equal votes by diluting the voting strength of residents of areas with high undercount, the Secretary's decision was to be reviewed under a line of analysis that begins with Baker v. Carr, 369 U.S. 186 (1962), and continues through Karcher v. Daggett, 462 U.S. 725 (1983). Pet. App. 26-31. That line of cases, according to the court of appeals, (1) requires that, as near as practicable, one person's vote must be worth as much as another's; (2) holds that the right to vote is impaired by dilution as well as by complete disenfranchisement; and (3) imposes upon states the obligation to make a good-faith effort to achieve the goal of one-person, one-vote. Pet. App. 31. The court of appeals

concluded that the same reasoning applies, mutatis mutandis, to federal decisions bearing on equality of representation. Because of separation of powers considerations, the court of appeals determined, de novo review would be inappropriate. Pet. App. 34. And because of constitutional constraints, precise equality of populations in congressional districts cannot be maintained across state lines. Nonetheless, the court of appeals reasoned that recent decisions of this Court, including United States Dep't of Commerce v. Montana, 503 U.S. 442, 463-464 (1992), and Franklin v. Massachusetts, ___ U.S. ___, 112 S.Ct. 2767, 2777 (1992), teach that a good-faith effort to achieve equality of voting power as nearly as is practicable is required of federal officials in the discharge of responsibilities to conduct and report the census. Pet. App. 34-35.

Applying Karcher v. Daggett, 462 U.S. at 730-731, the court of appeals held that the burden was initially on plaintiffs to show that the Secretary had failed to make a good-faith effort to achieve a census as accurate as practicable. Pet. App. 36-37. The court held that plaintiffs had met that burden by demonstrating that the adjusted counts were generally more accurate, especially with respect to alleviating the differential undercount of minorities, and by showing that the Secretary had declined to adopt the more accurate adjusted counts because he remained uncertain about distributive accuracy at some smaller geographic levels. Pet. App. 38-39.

Following Karcher, 462 U.S. at 740, the court of appeals concluded that plaintiffs' proof sufficed to shift the burden to the Secretary to show that use of the less accurate unadjusted census data "(a) furthers a governmental objective that is legitimate, and (b) is essential for the

achievement of that objective." Pet. App. 37, 40. The court of appeals remanded the case to permit the Secretary to essay that demonstration.

REASONS FOR DENYING THE PETITION

1. The Petitions Fail to Present Unusual Circumstances Warranting Interlocutory Review

The petitions seek interlocutory review by this Court. As the United States recognizes, "The court of appeals in this case did not squarely hold that the Secretary's decision against adjustment violated the Constitution." U.S. Pet. 28. Nor did the court of appeals discuss appropriate relief to be awarded by the district court, should that court on remand find in favor of plaintiffs. Ordinarily, the writ of certiorari is not granted to review interlocutory orders. See Virginia Military Institute v. United States, ___ U.S. ___, 113 S.Ct. 2431

(1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction") (collecting cases). Issuance of a writ of certiorari in cases presented for review of interlocutory orders is confined to instances in which review "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." American Construction Co. v. Jacksonville, T. & K. R. Co., 148 U.S. 372, 384 (1893). "[E]xcept in extraordinary cases, the writ is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). See R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 4.18, pp. 195-198 (1993).

Wisconsin and Oklahoma do not, in their petitions, acknowledge that they seek review of an interlocutory order; accordingly, they present no extraordinary circumstances to justify issuance of the writs they seek.

The United States, by contrast, admits that "the interlocutory posture of the case might in other circumstances weigh against review by this Court," but suggests that "unusual circumstances" warrant review now. U.S. Pet. 28.

The United States identifies only two "unusual circumstances" to justify the grant of certiorari at this stage of the litigation. First, the United States argues that the failure to grant review will mean that "this case may well remain unresolved at or near the time of the 1996 presidential and congressional elections, [which] could be avoided if this Court grants review at this time." U.S. Pet. 29. Obtaining two extensions of time in the process, the United States delayed until June 1995 to file a petition for review of the court of appeals' decision, rendered in August 1994; were the United States seriously committed to expedited resolution of this case, its prompt filing of a

petition for certiorari would have permitted denial of the petition for interlocutory review, remand to the district court and review by this Court after final judgment before the 1996 elections. Having acted tardily, the United States should not now be heard to invoke an exigency of its own making as a basis for interlocutory review. In any event, this case was also unresolved at the time of the 1992 presidential and congressional elections (at which time the case had been tried to the district court and a decision after trial was pending) and at the time of the 1994 congressional elections (at which time the case had been decided by the court of appeals and petitions for rehearing filed by the states of Wisconsin and Oklahoma were sub judice). The United States cites nothing to suggest that any uncertainties created by the pendency of the district court's decision in 1992 or the existence of the unreviewed court of appeals decision in 1994 created any extraordinary inconvenience or

embarrassment for anyone at all, let alone petitioners in particular.[6]

The second putatively "unusual circumstance" the United States identifies is that "[n]o further proceedings are needed to clarify the issues presented or to render the case suitable for resolution by this Court." U.S. Pet. 29. Far from being unusual, however, that is the status petitioners can commonly claim in cases in which a court of appeals vacates the judgment of a district court and remands for further proceedings. That was, for example, the situation in Virginia Military Institute, in which the court denied a petition for certiorari after the court of appeals had vacated the judgment of the district court in favor of Virginia

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[6] Indeed, the situation in the fall of 1994 was more uncertain than it is now, since it was understood then that the federal defendants would probably not be seeking review of the court of appeals' decision. See B. Vobejda, "Administration Lets Census Ruling Stand; Decision Awaits on Use of Adjusted Numbers," Washington Post (September 22, 1994), at A18.

Military Institute and remanded the case for determination of an appropriate remedy. Concurring in the denial of the petition for certiorari, Justice Scalia noted his view that it was "prudent" to defer review until "the litigation below has come to final judgment."

Similar prudence is appropriate here. The United States offers as the question presented by its petition that of: "Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment of the 1990 census violated the Constitution." U.S. Pet. i. But the United States also acknowledges that the court of appeals did not "squarely" address that question. U.S. Pet. 28. And although the district court summarily concluded that the Secretary's decision did not violate the Constitution, inter alia, Pet. App. 94, the thrust of that court's analysis was directed at determining whether the decision was arbitrary and capricious in light of the Secretary's guidelines and

under the APA, Pet. App. 61-91. Thus, if this Court grants the pending petitions, it will be (on the United States' own view of the case) the first tribunal to consider whether the Secretary's decision violated the Constitution. Because this Court does not "ordinarily address for the first time . . . . an issue which the Court of Appeals has not addressed," J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 568 (1981), respondents submit that that is not a basis for the prudent exercise of certiorari jurisdiction.

Other related considerations yield the same conclusion. The present state of the record, despite the United States' assurances, requires at least some modest additions. Consider, for example, the question of the Bureau's best current estimate of overall undercount in the uncorrected 1990 census. In its petition, the United States first acknowledges that the Secretary of Commerce estimated the overall undercount to be 2.1% of the national

population. U.S. Pet. 4, citing Pet. App. 158. Then the United States says that the Bureau subsequently "represented at the trial in this case that the undercount was 1.6% of the population." U.S. Pet. 4, citing Pet. App. 58 n.12. The cited source is in the trial court's opinion, but not from the trial: it reflects the district court's reading of a newspaper story that appeared in December 1992, more than a half year after the trial ended and the record closed. Next, citing a 1993 publication by Barbara E. Bryant, then Director of the Bureau, the United States says the Bureau subsequently lowered its estimate of the undercount to 0.9% to 1.2%. U.S. Pet. 4 n.4. Finally, citing no source at all, the United States asserts that, "The Commerce Department now believes, however, that 1.6% is the correct estimate of the undercount."

The United States is not prepared to stipulate that the outcome of a remand is a foregone conclusion. The

Second Circuit imposed upon the Secretary, on remand, a precisely stated burden: to show that the decision against adjustment "(a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective." Pet. App. 40. That burden, to be sure, is more onerous than what the district court required of the Secretary. But the United States has not claimed that the standard dictates the result. We do not believe it can be inferred from the United States' silence in its petition that, on remand, the United States will deem itself bound to confess judgment. On the contrary, we believe that this Court should have the benefit of the United States' proffer and its disposition by the lower courts.

Finally, no court has yet considered what, if any, relief would be appropriate upon plaintiffs' proof of their claims. The United States has specifically reserved at least the argument that, even were the case remanded to the

district court and the district court to enter judgment in favor of plaintiffs, an order requiring reapportionment of the House of Representatives would be inappropriate. U.S. Pet. 27 n.24. There is no suggestion in any of the petitions, nor anywhere else in the record, that this case is one in which interlocutory review is needed to protect petitioners against injuries that would occur as a consequence of the entry of a final judgment in plaintiffs' favor and that could not be completely redressed through full review after final judgment in keeping with this Court's usual practice.

2. The Decision of the Court of Appeals, Which Vacated the Judgment of the District Court and Remanded the Case for Further Proceedings, Was Correct

Petitioners' argument that no further proceedings are necessary before review of the court of appeals' decision rests fundamentally on the claim that that decision is so obviously and grievously flawed that it merits immediate

reversal. The United States purports to identify three major defects in the court of appeals' decision: that the court of appeals erroneously preferred numeric to distributive accuracy and rejected the Secretary's well-reasoned reliance on distributive accuracy, U.S. Pet. 22; that the court of appeals had no basis for its conclusions that plaintiffs had shown the adjusted data to be more accurate and that plaintiffs had shown the Secretary's contrary determination did not reflect an effort to achieve the most accurate census practicable, U.S. Pet. 23; and that the court of appeals wrongly mandated heightened scrutiny of the Secretary's decision merely because that decision had a racially disparate impact, U.S. Pet. 23-26. In fact, the court of appeals' decision reflects no misunderstanding of the Secretary's decision or the record of the case and no departure from this Court's precedents.

a. There is not, and never has been, any dispute in this litigation (or among experts on the adjustment issue) that distributive accuracy is the object of adjustment. Virtually all of the loss function analyses conducted by the Bureau and presented at trial were comparisons of distributive accuracy. See Pet. App. 366 (Bureau used "loss function analysis to assess the accuracy of the distributions of population across states, places, and counties for the adjusted and unadjusted census"). That is apparent from the district court's opinion, which explicitly accepts the primacy of distributive accuracy, Pet. App. 77, and, equally explicitly, finds that the Bureau's analyses demonstrated the superior accuracy of the adjusted counts "for most purposes," Pet. App. 59. The parties' dispute over those analyses was not over whether distributive accuracy was the appropriate criterion for decision. Rather, the dispute was over whether the Secretary, by rejecting the

Bureau's analyses of distributive accuracy in favor of his own interpretations of the data, decided against the most distributively accurate census practicable. See Pet. App. 21.

The United States asserts that the court of appeals, erroneously preferring numeric to distributive accuracy, faulted the Secretary for his contrary preference, while "entirely fail[ing] to explain how the goal of equal representation for equal numbers of people in the several States could be better served by focusing on the total numeric accuracy of the census figures at the national level." U.S. Pet. 22 (emphasis in original). But that assertion misstates the court of appeals' analysis. The critical paragraph in the court of appeals' decision, in which the court explained the basis for its conclusion that the Secretary's judgment was not made in good faith, is as follows:

> In the present case, the findings of the district court . . . plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable. Those findings are supported by, inter alia, the Secretary's acknowledgement that the PES-indicated adjustments would likely not only make the census more accurate nationally, but would also reduce the disparate impact of the census' inaccuracies on minority groups, and that he gave other factors priority over achievement of greater accuracy. For example, he stated that he valued "distributive accuracy" over numerical accuracy; and in stating that an adjustment would not be made because it would not result in greater distributive accuracy, the Secretary revealed that he would decline to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate.

Pet. App. 38 (emphasis in original). The court of appeals did not state that it concluded numeric accuracy was more important that distributive accuracy. Rather, the court gave

it as the Secretary's conclusion that residual uncertainty about what he called "distributive accuracy" was more important than certainty about "lessen[ing] the disproportionate undercounting of minorities" -- which he called "numeric accuracy."

The Bureau had developed the PES as a census adjustment technique precisely because of a concern for the distributive consequences of differential undercounting of members of minority groups. Pet. App. 50-51. If members of minority groups were evenly distributed throughout the nation, the differential undercount would have had no consequences in terms of representation or funding. But they are not so distributed: they are concentrated in certain areas. Pet. App. 17. That is why the differential undercount has "deleterious effects on the accuracy of census counts" and "unfair results aris[e] from such inaccuracy," Pet. App. 50.

The Secretary conceded that the "PES-adjusted estimates reflect more accurately the total population and the racial and ethnic populations of the country." Pet. App. 146 (emphasis supplied). With that concession, the Secretary also conceded (albeit tacitly) that, ceteris paribus, adjustment would improve the distributive accuracy of the census. The Secretary himself chose to describe that consequence, misleadingly, as only "[i]mproved numeric accuracy," Pet. App. 147. The court of appeals, by contrast, recognized the distributive (i.e., geographically differential) consequences of the differential undercount: "The impact of the differential undercount was naturally more severe in those areas in which racial and ethnic minorities were more concentrated." Pet. App. 17. The court of appeals' decision reflects a primary concern with the distributive consequences of the undercount; understandably, the decision does not present a justification

for a preference for numeric accuracy, because the decision reflects no such preference.

b. The United States discounts as unexplained the district court's several findings that the adjusted data had been shown to be more accurate. U.S. Pet. 23. But the district court's statement that it was "satisfied that for most purposes the PES resulted in a more accurate" census, Pet. App. 59, follows a description of how the Bureau measured error in the PES and compared the accuracy of the adjusted and the unadjusted counts, id. That analysis formed the basis for the district court's further statement that, had it been considering the issue de novo, it "would probably have ordered the adjustment." Pet. App. 89. Those findings provide a solid basis for the court of appeals' conclusion that plaintiffs had shown the adjusted counts to be more accurate.

Because it confined itself to determining whether "the Secretary's conclusions under each guideline" were arbitrary and capricious, the district court did not set aside the Secretary's decision. Pet. App. 89. Deferring to the Secretary's authority both to set the criteria for decision by creating the guidelines and to decide the adjustment issue by applying his guidelines, the district court concluded that "under Guideline One, the presumption of accuracy runs in favor of the original census count," Pet. App. 84, and thus that the Secretary's decision would stand unless plaintiffs demonstrated the superior accuracy of the adjusted counts both (1) at every level mentioned in Guideline One, and (2) for every reasonable definition of accuracy, Pet. App. 78. Invoking that high standard, the district court deferred to the Secretary's interpretation of the loss function analysis for states and his stated concern about the absence of "direct evidence" for improvement of distributive accuracy

for places of under 100,000 persons.[7] Pet. App. 78. In the district court's view, all of the evidence that had satisfied that court that the adjusted counts were more accurate, Pet.

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[7] The Secretary's ostensible concern about the absence of "direct evidence" for places of under 100,000 population disregarded the Bureau's conclusions that "adjusted counts are generally more accurate" for small areas and the specific results of Bureau analyses showing improved distributive accuracy for "metropolitan places of less than 25,000, 25,000-49,000 and 50,000 or more, and for nonmetropolitan places less than 25,000 and 25,000-49,000 in total," Pet. App. 192.

Another ostensible concern mentioned by the Secretary -- that adjustment would worsen distributive accuracy for 11 of 23 cities with populations over 500,000, Pet. App. 141 -- was not discussed at trial because defendants there never relied upon it. In stating that concern the Secretary's decision repeats both of the mistakes identified with respect to the Secretary's report that adjustment would "worsen" distributive accuracy for more than twenty states -- disregard of both magnitude and probability of error. See above, pp. 20-22. Moreover, the loss function analysis for large cities considers only the cities' relative shares of the population living in such cities -- not the cities' shares of the national population or of their respective states. Large cities do not compete directly (let alone exclusively) with one another for representation or funding. The comparison, even if properly executed, thus involves a factor of no constitutional (or other legal) significance.

App. 59, was insufficient to overcome the powerful presumption created by Guideline One.

The court of appeals disapproved the district court's extreme deference. Following this Court's teaching in Montana, 503 U.S. at 460-464, and on the analysis therein of the line of authority that runs from Wesberry v. Sanders, 376 U.S. 1 (1964), through Karcher v. Daggett, 462 U.S. 725 (1983), the court of appeals observed that the requirement of a "good-faith effort" to achieve equality, where allocation of political representation is at issue, is imposed on federal, as well as state, actors. The court of appeals recognized that constitutional constraints on the apportionment of the House of Representatives mean that "the goal of precise equality in voting power is 'illusory for the Nation as a whole,'" Pet. App. 35 (quoting Montana, 503 U.S. at 463), but concluded that "[t]he impossibility of

achieving precise mathematical equality is no excuse for not making this mandated good-faith effort." Pet. App. 35.

Applying the analytic framework of Karcher, 462 U.S. at 730-731, the court of appeals accepted the district court's finding that the adjusted counts had been shown to be more accurate, Pet. App. 21-22, and proceeded to the question of whether plaintiffs had carried their burden of showing the decision to use less accurate data "was not the product of a good-faith effort to achieve equality," Pet. App. 37. In considerable detail, the court of appeals spelled out the bases for its determination that plaintiffs had carried that burden. Pet. App. 38-39.

Despite the United States' argument, U.S. Pet. 16-17, nothing in Franklin v. Massachusetts is to the contrary. Franklin holds that the standard for reviewing a decision by the Secretary concerning conduct of the census is "consisten[cy] with the constitutional language and the

constitutional goal of equal representation." Franklin, 112 S.Ct. at 2777 (emphasis supplied). The court of appeals explicitly applied the Franklin standard in determining that the Secretary was "required to make a good-faith effort to achieve the Constitution's plain objective of equal representation for equal numbers of people." Pet. App. 35.

c. The court of appeals did not proceed in contravention of Washington v. Davis, 426 U.S. 229 (1976). Citing Washington, the court explained that "[a]lthough for most types of equal protection claims, a plaintiff must show that the government's discrimination was intentional, the Supreme Court has not imposed such a requirement in any of the cases involving apportionment." Pet. App. 35-36 (citations omitted). In such cases, a plaintiff is required to show only "that the governmental entity failed to make a good-faith effort to achieve equal districts as nearly as practicable." Pet. App. 36. The court

of appeals also explained that the right sought to be vindicated in apportionment cases is one of equal protection.[8] Pet. App. 31.

The racial and ethnic character of the differential undercount is relevant because it establishes that the uncorrected census compromises the equality of allocations of political representation based thereon. The court of appeals stated that, "[i]n general, if a law alleged to infringe a certain right directly would require a heightened degree of scrutiny, heightened scrutiny should also be given when the law is alleged to infringe that right discriminatorily." Pet. App. 33. The heightened scrutiny is occasioned by the nature of the right infringed, not by the fact of direct or discriminatory infringement. Thus, the court of appeals did not conclude that heightened scrutiny

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[8] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976).

was warranted simply because the differential character of the undercount peculiarly affects minorities. And surely a decision that impairs equal representation is subject to no lower scrutiny simply because a disproportionate number of those whose voting strength is diluted are members of minority groups.

By recasting the issue as one involving the necessity of proving intent, the United States avoids any discussion of the court of appeals' actual analysis.[9] Notably, though

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[9] The United States, admitting that "it is undisputed that racial minorities were disproportionately undercounted in the 1990 census," then argues that it has not been shown "that a failure to adjust the census totals would in turn have a disparate racial impact with respect to the proper allocation of Representatives among the States, the only constitutionally prescribed use of census data." U.S. Pet. 26. In terms of the apportionment of the House, the adjustment considered by the Secretary in 1991 would have shifted two seats, one from Wisconsin to California, one from Pennsylvania to Arizona. In each instance, a seat would have shifted from a state with a disproportionately white population and lower-than-average undercount to a state with a disproportionately non-white population and greater-than-average undercount. Thus, on average, adjustment would have increased the representational

proclaiming that the decision against adjustment was made without discriminatory animus, the Untied States fails to assert that it was made in a good faith effort to enhance census accuracy. Similarly, the United States fails to explain what legitimate governmental objective reliance upon the unadjusted count is essential to achieve. On remand, the United States will have the opportunity to complete the record in this case by proffering such an explanation.

3. There Is No Conflict among the Courts of Appeals to Warrant Review by This Court

Dissenting in the court of appeals below, the late Judge Timbers stated that "[t]he only two other circuits that have ruled on this issue have agreed with Judge

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strength of areas with higher concentrations of minorities. Obviously, the shifted seats might have been filled by white Representatives. But the Constitution guarantees only that electoral power will be allocated to constituencies on a racially-neutral basis, not that the racial composition of any legislature will reflect national demographic proportions.

McLaughlin," citing City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1217 (1994); Tucker v. United States Dep't of Commerce, 958 F.2d 1411 (7th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 407 (1992). Judge Timbers thus described the Second Circuit's decision as "creat[ing] a conflict among the circuits." Pet. App. 40.

It is true that neither the Sixth nor the Seventh Circuit ordered that the census be statistically adjusted or held that the Secretary's decision violated the Constitution. But neither did the Second Circuit order an adjustment or conclude that a constitutional violation had occurred. In fact, examination of the relevant decisions reveals that, notwithstanding the dissent in the Second Circuit, the three cases addressed different issues under different analyses; there is no conflict among them, certainly none that warrants review now by this Court.

Tucker was the first of the three cases to be decided.[10] While the census, including the PES, was still being conducted, and thus before Secretary Mosbacher had announced his decision concerning adjustment, the Tucker plaintiffs sought an order that the census be adjusted by unspecified means to correct for undercounting in Illinois.[11] Tucker v. United States Dep't of Commerce, 135 F.R.D. 175, 176 (N.D. Ill. 1991). The district court, concerned

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[10] It was not, of course, the first to be filed. The present case was filed first, in 1988. Tucker was filed in 1990, and City of Detroit in 1991. The earlier decision in Tucker is attributable to the decision of the plaintiffs in that case to seek adjustment of the census without waiting for Secretary Mosbacher's decision.

[11] The Tucker plaintiffs did not, and could not, challenge the apportionment of the House of Representatives, because no plausible correction for undercount in the 1990 census would have added a seat to (or, for that matter, subtracted a seat from) Illinois' delegation. To the extent that the Tucker plaintiffs complained that they had been denied federal representation, see Tucker, 135 F.R.D. at 176, their complaint was that they were underrepresented vis-a-vis residents of other parts of Illinois.

that the outcome of that case might differ from that in other litigation, found the action non-justiciable. Id., 135 F.R.D. at 181-182..

The Seventh Circuit affirmed, on other grounds. That court of appeals rejected the district court's conclusion that the case was non-justiciable as presenting a political question, Tucker v. United States Dep't of Commerce, 958 F.2d at 1415, but affirmed the result, holding that plaintiffs' suit was barred by the intended-plaintiff doctrine, id., 958 F.2d at 1416. In the view of the Seventh Circuit, the Tucker plaintiffs could not show that, even assuming a violation of a constitutional or statutory right, they were "within the class of persons who have been given a right to litigate the violation." Id. (emphasis in original). In arriving at that result, the Seventh Circuit determined only that "Article I, section 2, clause 3 [("Apportionment Clause")] does not authorize lawsuits founded on

disagreement with the Census Bureau's statistical methodology." Id., 958 F.2d at 1418. The Seventh Circuit did not have before it, and so did not consider, a challenge to the Secretary's decision under the Fifth Amendment.[12]

In discussing its application of the intended-plaintiff doctrine, the Seventh Circuit suggested that the same doctrine would bar Massachusetts' suit, which later reached this Court in Franklin v. Massachusetts. Obviously, this Court did not follow the Seventh Circuit's approach, and Wisconsin admits that "this Court's decision in Franklin v. Massachusetts casts doubt on Tucker's specific holding," Wisc. Pet. 16, while the United States does not even

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[12] Indeed, the court of appeals' decision in Tucker mentions the Secretary's decision only once, in a passing reference during a preliminary statement of the background of the case. And while it is arguable that the Seventh Circuit also considered the viability of a challenge under the APA, see id., 958 F.2d at 1416, in context it is clear that the court had in mind a general challenge to the technique of census-taking adopted by the Bureau, not a specific challenge to the Secretary's actual decision.

describe the holding in Tucker and that in this case as being in conflict, U.S. Pet. 26-27. Moreover, in light of Franklin v. Massachusetts, no petitioner here suggests that this Court adopt the Seventh Circuit's application of the intended-plaintiff doctrine. In any event, the specific proposition for which all three petitions cite the court of appeals' decision in Tucker -- that the Apportionment Clause does not per se authorize a suit founded on nothing more than a disagreement with the Bureau's census methodology[13] -- conflicts with nothing in the Second Circuit's decision.

Like Tucker, City of Detroit was a local case, brought by the City of Detroit and its mayor to compel an adjustment or revision of the census for Michigan alone.[14]

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[13] Wisc. Pet. 17, Okla. Pet. 13, U.S. Pet. 27.

[14] As with the Tucker plaintiffs, the City of Detroit plaintiffs alleged that undercounting had deprived them of representation in Congress. City of Detroit, 800 F. Supp. at 540. No national adjustment would have added to (or subtracted from) Michigan's allocation of seats in the House of Representatives; however, the City of Detroit plaintiffs

City of Detroit v. Franklin, 800 F. Supp. 539, 540 (E.D. Mich. 1992). Affirming the trial court's grant of summary judgment, id., 800 F. Supp. at 542-547, the Sixth Circuit held that: (1) with respect to plaintiffs' claims concerning intra-state redistricting, they lacked standing, because the state was at liberty to use other than federal census data for redistricting and there was thus no causal nexus between the challenged (census-taking) conduct and the asserted (representational) injury, City of Detroit, 4 F.3d at 1372-1374; and (2) with respect to plaintiffs' claims concerning federal funding, the Apportionment Clause per se did not create "a right to census accuracy," and an adjustment of Michigan alone, leaving other states untouched, would not increase the overall accuracy of the census, id., 4 F.3d at 1375-1378. While the court of appeals in City of Detroit did refer to the Secretary's decision, it did so only to

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argued that Michigan alone should receive adjusted census figures. City of Detroit, 4 F.3d at 1377.

buttress the point that a special adjustment for Michigan would be "impractical," id. at 1378.

Once again, no petitioner suggests that this Court adopt the Sixth Circuit's standing analysis.[15] Oklahoma and the United States cite the Sixth Circuit's quotation, City of Detroit, 4 F.3d at 1378, of language from Tucker, 958 F.2d at 1418, that a "claim to a census adjustment invokes no judicially administrable standards." That language, however, is part of the Seventh Circuit's analysis of the intended-plaintiff doctrine, as applied to the case before that court, and is inapplicable to the present case. Notably, the United States never argues that either the Sixth or the

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[15] Wisconsin, despite having observed that the continuing vitality of the Seventh Circuit's decision in Tucker is questionable and that the Sixth Circuit's decision in City of Detroit "follow[s] Tucker's reasoning," Wisc. Pet. 17, suggests that the Second Circuit should have considered plaintiffs' ability to use the adjusted data for intra-state redistricting but does not suggest that that consideration (whatever its result) would have affected plaintiffs' standing. Wisc. Pet. 17-18.

Seventh Circuit was correct in concluding that a claim to a census adjustment can never be said to invoke judicially administrable standards – certainly the United States makes no such argument about the claim presented here. Given the nature of the claim before the Sixth Circuit, there is nothing in City of Detroit, any more than in Tucker, that conflicts with the Second Circuit's decision.

Neither Tucker nor City of Detroit involved a claim affecting the national apportionment of the House of Representatives, neither considered a challenge under the Fifth Amendment to the Secretary's decision, and certainly neither addressed the standard of review appropriate upon such a challenge. Although all three courts of appeals dealt generally with matters of census adjustment, they were presented with very different questions: the different substantive results reflect those differences, not a conflict among the circuits.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari in Nos. 94-1614, 94-1631 and 94-1985 should be denied.

Respectfully submitted.

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Nos. 94-1614, 94-1631 and 94-1985

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STATE OF WISCONSIN,
Petitioner,
v.
CITY OF NEW YORK, *et al.*,
Respondents.

STATE OF OKLAHOMA,
Petitioner,
v.
CITY OF NEW YORK, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
Petitioners,
v.
CITY OF NEW YORK, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF INDIANA AND OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1614

STATE OF WISCONSIN,
Petitioner,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

No. 94-1631

STATE OF OKLAHOMA,
Petitioner,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

No. 94-1985

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
Petitioners,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE STATES OF INDIANA AND OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI*

Amici—all States—have strong interests in this case. The decision of the Second Circuit, in conflict with the decisions of two other circuits, subjects the federal government to stringent new constitutional constraints on the methods by which it arrives at its census count every ten years. The ruling casts a cloud over the 1990 census count and hence the current allocation of congressional seats among the States, as well as state legislative apportionments that are based on census figures. The legal standards declared by the Second Circuit, if allowed to stand, also will significantly influence the census counts required to be conducted in 2000 and each decade after (and, possibly, the judicial analysis of government action outside the census context). In addition, the ruling has concrete effects on the allocation of large sums of federal money under dozens of federal programs that use the census count to determine the amounts distributed. *Amici* accordingly have a direct interest in having this Court resolve the uncertainty over the census issue presented in this case.

STATEMENT

Every ten years since 1790, the federal government has been conducting an actual count of people for the census required by Article I, Section 2, clause 3 of the United States Constitution, which provides that "[t]he actual Enumeration shall be made . . . [every] ten Years, in such Manner as [Congress] shall by Law direct." It is undisputed in this case that census results miss some people and that more racial minorities are missed than others. *See also* U.S. Pet. 4 (differential undercount also exists for other groups, including men, the young, and renters). In 1987, after considering demands for the use of statistical adjustments of the actual count to correct for this undercount, the United States Secretary of Commerce announced that he would not use statistical sampling methods to adjust the results of the upcoming 1990 federal census.

The following year, plaintiffs—including several States, municipalities, and individuals—brought this action to challenge the Secretary's decision, seeking to compel the adoption of statistical adjustments to the census count. The federal government moved to dismiss the complaint on the ground that the census-count methodology was not subject to judicial review. The district court denied the motion, holding that plaintiffs had standing to challenge the census count on constitutional grounds and that the Secretary's decision should be reviewed under the "arbitrary and capricious" standard of the Administrative Procedure Act. *City of New York v. U.S. Dep't of Commerce*, 713 F. Supp. 48, 52, 54 (E.D.N.Y. 1989) [*City of New York I*], reprinted at Pet. App. 121.[1]

In 1989, the district court approved a stipulation among the parties requiring the plaintiffs to withdraw their motion to enjoin the conduct of the census and the Secretary to reconsider *de novo* his 1987 decision against statistical adjustment. Pursuant to the stipulation, the Secretary in 1990 published a set of Guidelines for re-evaluating the adjustment question, under which, among other things, the burden of proving greater accuracy would be on those seeking an adjustment. *See* 55 Fed. Reg. 9,838 (1990). The district court subsequently held that a statistical adjustment would not in itself violate federal law and that the Guidelines were consistent with the stipulation and not unduly biased against adjustment. *City of New York v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 767, 770 (E.D.N.Y. 1990) [*City of New York II*], reprinted at Pet. App. 96.

After elaborately planning, conducting, and compiling the results of the actual census count in 1990, the Secretary undertook the agreed-upon process for determining whether to adjust the count by statistical methods. Based on a second survey of some 5,000 of the 5,000,000 census

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[1] We refer to the appendix to the petition in No. 94-1614 as "Pet. App."

blocks in the Nation, complex statistical methods were applied to produce estimates of the population that differed slightly from the count produced by the 1990 census—by 2.1% originally, by 1.6% after a subsequent correction (in 1993), though still with various biases and unproved but important assumptions inherent in the estimates. Then, after detailed consideration based on the differing views of numerous experts, the Secretary decided on July 15, 1991, that he would not replace the census-count results with the figures produced by the statistical sampling, noting in particular that the proposed statistical adjustment did *not* improve "distributive accuracy," *i.e.*, "getting most nearly correct the proportions of people in different areas." Pet. App. 146-47; *see City of New York II*, 739 F. Supp. at 769 [Pet. App. 114] (Guideline requiring that any adjustment be usable "at all levels"). While acknowledging an overall national undercount among certain populations, including minority groups, the Secretary decided that he would not "abandon a two hundred year tradition of how we actually count people" in favor of the proposed sample-based statistical adjustment. Pet. App. 138; *id.* at 135-415; 56 Fed. Reg. 33,582 (1991); *see City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906, 911, 916 n.12 (E.D.N.Y. 1993) [*City of New York III*], reprinted at Pet. App. 41; *see also* 58 Fed. Reg. 69, 73 (1993).

Plaintiffs again attacked the decision not to adjust the census. After consolidating the case with other cases from Florida and Georgia, the district court held a 13-day bench trial, hearing testimony from various experts. The court rejected plaintiffs' claims and upheld the Secretary's decision not to replace the actual count with a statistically based adjustment. *See City of New York III, supra.* The court found the Secretary's rationale for rejecting the adjustment reasonable on a host of grounds, summing up by quoting an expert who had supported adjustment: " 'reasonable statisticians could differ on this conclusion.' "

822 F. Supp. at 929 [Pet. App. 91]; *id.* at 917-31 [Pet. App. 61-95].

On appeal, a divided panel of the Second Circuit reversed. *City of New York v. U.S. Dep't of Commerce*, 34 F.3d 1114 (2d Cir. 1994) [*City of New York IV*], reprinted at Pet. App. 1. The court held that "heightened scrutiny" of the Secretary's census methodology was constitutionally required (a) under the one-person-one-vote apportionment decisions (*e.g., Wesberry v. Sanders*, 376 U.S. 1 (1964); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Karcher v. Daggett*, 462 U.S. 725 (1983)) and (b) because "the unadjusted census undercount disproportionately disadvantages certain identifiable minority groups." 34 F.3d at 1128 [Pet. App. 33]; *see id.* at 1129, 1131 [Pet. App. 34, 39]. Applying what it described as "the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity" (*id.* at 1131 [Pet. App. 39-40]), the panel majority ruled that the Secretary's decision not to adjust the census (though a "choice . . . among imperfect alternatives") was unconstitutional, as not a good faith effort to achieve national numerical accuracy as nearly as practicable, unless the Secretary could prove on remand that the decision not to replace the census count with a statistical adjustment "furthers a governmental objective that is legitimate" and "is essential for the achievement of that objective." *Id.* at 1131 [Pet. App. 40].

Judge Timbers dissented, stating that he would follow the district court's decision upholding the Secretary's determination. He also pointed out that the panel majority's decision was in conflict with "[t]he only two other circuits that have ruled on this issue," *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992), and *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), both of which held that the Constitution

did not provide a basis for judicial invalidation of the Secretary's choice among reasonable alternative census methodologies. *See City of New York IV*, 34 F.3d at 1131-32 (Timbers, J., dissenting) [Pet. App. 40].

REASONS FOR GRANTING THE PETITIONS

The decision of the court of appeals should be reviewed for two reasons. First, it creates a conflict among the circuits on an issue of great and recurring national importance. Second, the decision is unjustified on the merits.

I. THE SECOND CIRCUIT'S DECISION CREATES A CONFLICT AMONG THE CIRCUITS ON AN ISSUE OF GREAT AND RECURRING IMPORTANCE.

The Second Circuit's application of heightened judicial scrutiny to the Secretary's census methodology squarely conflicts, as Judge Timbers observed, with decisions of the Seventh and Sixth Circuits, the only other courts of appeals that have addressed the issue presented. In *Tucker*, the Seventh Circuit thoroughly considered and rejected a challenge to the Secretary's refusal to undertake "a statistical adjustment to the census headcount." 958 F.2d at 1418. The court explained that (a) the disproportionate undercount of minorities, not being purposeful, afforded no basis for heightened judicial scrutiny (*id.* at 1413-14) and (b) the *Wesberry* apportionment doctrine furnished no such basis, because the question of accuracy in the census count was entirely different from the question of equal allocation of voters to electoral districts—not only conceptually but practically: whereas "[e]quality of voting power is an administrable standard, . . . [t]he plaintiffs' claim to a census adjustment invokes no judicially administrable standards. The plaintiffs are not asking us to decree equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical

adjustment to the census headcount." *Id.* at 1418. *Tucker* was explicitly followed by the Sixth Circuit in its subsequent rejection of a similar request for a judicial order compelling the Secretary to adopt an adjustment of the actual census count based on statistical sampling. *City of Detroit*, 4 F.3d at 1375-78.

The decisions of the Seventh and Sixth Circuits thus reject the very claim that the Second Circuit has held warrants heightened judicial scrutiny.[2] Yet the Second Circuit judgment would seem effectively to control the issue nationwide, as the Secretary makes a single national decision to adjust the census or not. With a clear split among the circuits, the issue presented should be subject to a binding national resolution only if that resolution comes from this Court.

The issue presented in these cases is a recurring one. The stringent constitutional standards announced by the Second Circuit will, if unreviewed, apply to the decisions by Congress and the Executive about how to conduct all future censuses, which under the Constitution must be conducted every ten years. U.S. Const., Art. I, Sec. 2, cl. 3. The Second Circuit's decision undoubtedly will provoke complex litigation no matter what choices the federal government makes about future census methodologies. *See, e.g.*, note 11, *infra*. This Court should not

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[2] The Seventh Circuit in *Tucker* phrased its conclusion in terms of the lack of a judicially enforceable right to invalidate the Secretary's census methodology. 958 F.2d at 1418, 1419. But because the court distinguished challenges "to some categorical judgment of inclusion or exclusion argued to be in violation of history, logic, and common sense" (*id.* at 1418), *Tucker*'s holding appears to be equivalently phrased as a determination that the Constitution is not violated by the Secretary's choice among reasonable alternative methodologies. In any event, the result of the Second Circuit decision in the present case is squarely to allow what both the Seventh and Sixth Circuits forbid: judicial invalidation of the Secretary's decision to stay with the actual count as the census methodology.

allow the government's decisions on the many policy and technical issues that determine census methodology to be made under the cloud of an unreviewed constitutional ruling imposing stringent, and unjustified, constraints on those decisions. Nor should the Court allow numerous governmental decisions outside the census context to be made under the cloud of the Second Circuit's novel invocation of heightened judicial scrutiny based entirely on disproportionate racial impact.

The choice of census methodology—now subject to the Second Circuit's new constitutional constraints, imposed in conflict with two other circuits—has important consequences. One set of consequences is representational. The census count directly affects the apportionment among the States of seats in the House of Representatives. U.S. Const., Art. I, Sec. 3, cl. 2; 2 U.S.C. § 2(a); 13 U.S.C. § 141(b). And the apportionment of state legislative seats also is widely based on the official federal census.[3] Even the current allocations of congressional and state-legislative seats, based on the 1990 census to which the Second Circuit's ruling directly applies, have been thrown into doubt: the adjustment originally calculated by the Secretary after the 1990 census would shift two congressional seats, from Wisconsin and

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[3] *See, e.g.*, Ala. Const. art. IX, § 198; Alaska Const. art. VI, § 3; Ariz. Rev. Stat. Ann. § 16-1102 (1994); Colo. Const. art. V, § 48; Conn. Const. art. III, § 6; Del. Code Ann. tit. 29, § 805 (1991); Ga. Const. art. III, § 2, ¶ 2; Haw. Rev. Stat. § 25-2 (1992); Ill. Const. art. IV, § 3; Ind. Const. art. IV, § 5; Iowa Const. art. III, § 34; Kan. Const. art. X, § 1; La. Const. art. III, § 6; Md. Const. art. III, § 5; Mass. Const. art. XIII; Mich. Const. art. 4, § 2; Mo. Const. art. III, § 2; Minn. Const. art. IV, § 3; Mont. Const. art. V, § 14; Neb. Const. art. III, § 5; N.H. Const. pt. 2, art. IX; N.J. Const. art. IV, § 2, ¶ 1; N.Y. Const. art. III, § 4; N.C. Const. art. II, § 3; Ohio Const. art. XI, § 2; Okla. Const. art. V, § 9A; Or. Const. art. IV, § 6; R.I. Const. art. VII, § 1; S.D. Const. art. III, § 5; Tex. Const. art. III, § 28; Utah Code Ann. § 36-1-1 (1953); Wash. Const. art. II, § 43; Wis. Const. art. IV, § 3; Wyo. Const. art. III, § 48.

Pennsylvania to Arizona and California. *City of New York IV*, 34 F.3d at 1122 [Pet. App. 17].

Substantial financial consequences also hinge on the official census, and hence on resolution of the uncertainty created by the Second Circuit's ruling. Dozens of federal programs allocate money to the States or their subdivisions based on the figures derived from the federal census. *See City of New York IV*, 34 F.3d at 1117 [Pet. App. 6]; *City of New York III*, 822 F.2d at 911, 918 n.17 [Pet. App. 45, 64]; GAO, *Formula Programs: Adjusted Census Data Would Redistribute Small Percentage of Funds to States* at 5, 16-19 (Nov. 1991) (one hundred such programs).[4] Although overall distributions of federal funds would not change dramatically in percentage terms under the particular adjustment at issue here (the population adjustments, after all, are small in percentage terms), the amounts of money that would be subtracted from or added to the allocations to various States under various programs are now, and can be expected to continue to be, substantial, especially as they occur year after year.[5] The Second Circuit's decision having these

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[4] *See, e.g.*, 24 C.F.R. § 570.307 (Community Development Block Grants); 42 U.S.C. § 5306(b)(1)(A)(i) (Community Development/Entitlement); 42 U.S.C. § 300x-7(a)(5)(B) (Community Mental Health Services); 20 U.S.C. § 2921(b) (Federal, State, and Local Partnerships for Educational Improvement); 24 C.F.R. § 791.402 (Housing Assistance Programs and Public and Indiana Housing Programs); 29 U.S.C. § 1572(a) (Job Training Partnership Act, Title IIA: Training Services for Disadvantaged Adult and Youth); 42 U.S.C. § 8623(a)(4) (Low-Income Home Energy Assistance); 42 U.S.C. §§ 702(c)(1)(B)(i), (ii), (Maternal and Child Health Services); 42 U.S.C. § 300w-1 (Preventive Health and Health Services); 42 U.S.C. § 1397f(a)(2)(C) (Social Services); 20 U.S.C. § 6333 (Strengthening and Improvement of Elementary and Secondary Schools); 23 U.S.C. § 104 (Surface Transportation Program).

[5] The GAO study cited in text estimated the reallocations for fiscal year 1991 of three of the 100 programs it identified as population based. For Federal Medicaid Allocations, 17 States would

effects on the budgets of state and local governments should not go unreviewed.

II. THE SECOND CIRCUIT'S APPLICATION OF HEIGHTENED JUDICIAL SCRUTINY TO THE SECRETARY'S CENSUS-COUNT DECISION RESTS ON NOVEL AND UNJUSTIFIED PRINCIPLES.

The Second Circuit decision warrants review not only because of the importance of the issue and the intercircuit conflict it creates, but because of the merits of the decision. The Second Circuit held that "heightened scrutiny" —which it described at one point as traditional strict scrutiny (*City of New York IV*, 34 F.3d at 1131 [Pet. App. 39-40])—applied to the Secretary's decision not to replace the actual census count with the results produced by a methodology based on statistical sampling. It rested that holding on two bases: the disproportionate effects of the census undercount on racial minorities; and the one-person-one-vote apportionment doctrine of *Wesberry* and its successors. The Second Circuit's decision cannot rest on either of these grounds under established constitutional doctrine.

A. The Second Circuit's reliance on disparate racial impact as a ground for heightened scrutiny (*City of New York IV*, 34 F.3d at 1129, 1131 [Pet. App. 33-34, 39]) appears to be directly contradicted by settled constitutional standards. Under *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), a constitutional claim of unlawful race discrimination is not made out by a showing of disparate racial impact, but requires proof of facial or purposeful discrimination. And knowledge of a disproportionate impact, while it may furnish evidence of, is simply not the same as discriminatory purpose. *See, e.g., Personnel Adm'r of Massachusetts v.*

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have lost well over $100 million in that year alone, while 23 States would have gained more than $40 million. GAO, *Formula Programs*, *supra*, at 24-25.

Feeney, 442 U.S. 256, 279 (1979) (government action must be taken " 'because of,' not merely 'in spite of' " its [racial] impact to raise a constitutional claim); *Arlington Heights*, 426 U.S. at 265-66.

In this case, the Second Circuit nowhere suggested that there was any hint of purposeful discrimination behind the Secretary's decision to follow consistent historical practice based on a host of patently good-faith, reasonable grounds for rejecting the proposed statistical adjustment. *See also Tucker*, 958 F.2d at 1413-14. The issue of race would seem, therefore, to drop out of this case under settled equal-protection doctrine. The Second Circuit pointed to no other doctrinal basis that supports its reliance on disparate impact as a justification for heightened judicial scrutiny.

B. The Second Circuit also relied on the *Wesberry* line of decisions as a justification for heightened judicial scrutiny of the Secretary's census-count decision. *City of New York IV*, 34 F.3d at 1125-29 [Pet. App. 26-35]. The court acknowledged in passing that "[t]here are, of course, differences between the present case and the *Wesberry* . . . line of cases." 34 F.3d at 1129 [Pet. App. 34]. But the court nevertheless announced that heightened scrutiny applied in this case, because the court wholly failed to recognize the nature and extent of those differences, as a conceptual, textual, precedential, and practical matter.

The *Wesberry* doctrine is concerned with equality in apportioning already-determined quantities. This case is concerned with accurate determination of the initial quantities. The conceptual difference is the difference between division, on the one hand, and counting or measurement, on the other. Thus, as the Seventh Circuit observed in *Tucker*, "this is [not] an apportionment case, or governed by those cases." 958 F.2d at 1415.[6]

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[6] *See also id.* at 1418 (because undercount disproportionately affects people who cannot or do not vote, "this is not a case about

As a textual matter, moreover, while the equal-apportionment issue is governed only by several (implied) equality commands of the Constitution (U.S. Const. Art. I, Sec. 2, cl. 2; Amends. 5, 14; *see Wesberry*, 376 U.S. at 4), the issue of the census count is addressed by a separate, specific clause of the Constitution, U.S. Const. Art. I, Sec. 2, cl. 3. That clause in terms provides for the census count to be conducted "in such Manner as [Congress] shall by Law direct."[7] Textually, then, the census-count question presented here, unlike the equal-apportionment question, is subject to an explicit vesting of discretion in Congress that at a minimum weighs strongly against the Second Circuit's borrowing of heightened scrutiny from the equal-apportionment doctrine. *Cf. United States Dep't of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992) (textual delegation to Congress even under Necessary and Proper Clause is reason for deference).

This Court's decisions have never applied heightened scrutiny to the Secretary's method of counting people for the census. *Wesberry*, *Kirkpatrick*, and *Karcher* all involved the decisions of *States* about the equal or unequal allocation of people into electoral districts. In *United States Dep't of Commerce v. Montana*, *supra*, and *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), this Court applied a principle of equal representation to the federal government. Both cases, however, involved the assignment among States of an already-fixed quantity: *Montana* involved the allocation among States of the 435 seats in the House of Representatives; *Franklin* involved the allocation of overseas federal employees to the States. Neither case involved judicial scrutiny of the accuracy of the federal government's count of people, which, indeed,

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depriving anybody of his right to vote or about diluting his voting power").

[7] Congress has in turn delegated substantial discretion to the Secretary of Commerce. *See* 13 U.S.C. §§ 141(a), 195.

Franklin recognized as a quite different question.[8] Moreover, even in an apportionment context, the Court in *Montana*, citing separation-of-powers and pragmatic concerns, specifically refused to transpose to the federal government the strict equality standard applied to the States in *Wesberry* and its successors. 112 S. Ct. at 1426, 1429.

There are also strong practical, institutional reasons for the judiciary in applying constitutional standards to distinguish the Secretary's census-count methodology—one that follows consistent historical practice—from "the much easier task of determining district sizes within State borders." *Montana*, 112 S. Ct. at 1429. An adjustment of the actual count based on statistical sampling raises a host of issues as to which there is no single clear "polestar" to "provide sufficient guidance" to courts (*ibid.*)—not only issues about required degrees of accuracy at national and subnational levels,[9] but also the complex technical judgments required in evaluating the assumptions, biases, and reliability of the range of possible statistical adjustments.[10] A choice of census methodology,

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[8] *Franklin*, 112 S. Ct. at 2776 ("even if appellees have standing to challenge the Secretary's decision to allocate, they do not have standing to challenge the accuracy of the data used in making that allocation").

[9] With respect to the basic choice of distributive accuracy in preference to overall national accuracy, see U.S. Pet. 16-17.

[10] The proposed adjustment at issue here, for example, presented serious questions on a number of scores: deficiencies in distributive accuracy (the adjustment may have been less accurate for 21-29 States), *City of New York III*, 822 F. Supp. at 922 [Pet. App. 74]; the uncertain accuracy of the post-enumeration survey (*id.* at 921-22 [Pet. App. 72-74]); the high degree of "imputation" of information required for the "matching" process essential to the adjustment (*id.* at 922-23 [Pet. App. 74-76]); the effect of biases, of the uncertain "homogeneity" assumption, and of the "smoothing" process underlying the adjustment (*id.* at 924, 926 [Pet. App. 79-84]); and the apparent non-robustness of the results, so that

unlike a state districting decision, is not "capable of being reviewed under a relatively rigid mathematical standard." *Ibid.* (footnote omitted). Applying heightened scrutiny to the Secretary's decision among reasonable alternative census methods would generate repeated and lengthy litigation over issues not readily amenable to judicial determination by a standard discernable from the Constitution. *Tucker*, 958 F.2d at 1418 ("The plaintiffs' claim to a census adjustment invokes no judicially administrable standards.").[11]

There are also policy reasons, beyond "technical" concerns, that legitimately weigh against any (judicially mandated) adoption of a statistical adjustment. For example, "any attempt to make a statistical adjustment to the mechanical headcount would, by injecting judgmental factors—and ones of considerable technical complexity to boot—open the census process to charges of political manipulation." *Tucker*, 958 F.2d at 1413. *See City of New York III*, 822 F. Supp. at 925-26 [Pet. App. 83]; Pet. App. 213-28. And displacement of the actual count by a sample-based adjustment could have an adverse

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reasonable changes in assumption would produce large changes in result (*ibid.*). *See also* Pet. App. 169-228; 58 Fed. Reg. at 74-75.

In 1993 the Secretary reiterated some of these points in deciding not to adjust the "intercensal" estimates: "In most statistical applications, we never know the true situation, and no model is perfect. Despite the extensive research, too many concerns remain about the level of bias; the estimate of the true population used as the target in loss function analyses; allocation of correlation bias; and whether the homogeneity assumption holds, given the levels of bias, to make a decision to adjust intercensal population estimates defensible across the board to all 44,055 substate areas." 58 Fed. Reg. 75.

[11] Once the issue of race is put aside, it is not clear why the Second Circuit's demand for equal accuracy in counting people would not condemn the conceded inaccuracies of the adjusted results at the subnational level (*see* page 4 & note 10, *supra*) any differently from the inaccuracies of the actual count at the national level.

effect on the census itself by diminishing the incentive of States and citizens to participate actively in the census, of census-takers to execute their responsibilities energetically, and of Congress to provide funding for the census. 822 F. Supp. at 927 [Pet. App. 85]; Pet. App. 228-38. All of these considerations undermine the Second Circuit's application of the *Wesberry* standard of heightened scrutiny to the quite different question of accuracy in the census count.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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(8) (6) (6)

Nos. 94-1614, 94-1631 and 94-1985

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In the Supreme Court of the United States

OCTOBER TERM, 1995

Supreme Court, U.S.
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STATE OF WISCONSIN, PETITIONER

v.

CITY OF NEW YORK, ET AL.

[Caption Continued on Inside Cover]

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari in No. 94-1985 Filed June 5, 1995
Certiorari Granted September 27, 1995

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STATE OF OKLAHOMA, PETITIONER

v.

CITY OF NEW YORK, ET AL.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 88-3474

THE CITY OF NEW YORK, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1988		
11/3	1	Complaint filed, summons issued. (ent. 11-7-88) LCJ
11/3	2	Pltffs NOTICE OF MOTION returnable 11-17-88 at 9:30 A.M. For a Preliminary Injunction pursuant to Rule 65. (ent. 11-7-88) LCJ (attached exhibits) LCJ
11/3	3	Pltffs MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR PRELIMINARY INJUNCTION. (ent. 11-7-88) LCJ
11/3	4, 5 & 6	VOLUMES 1 thru 3. Exhibits In Support Of Pltffs Motion For A Preliminary Injunction, (ent. 11-7-88) LCJ
		* * * *
12/14	10	AMENDED COMPLAINT filed. 12-15-88rc
12/16	11	DEFT'S NOTICE OF MOTION ret. 12-29-88 (U.S. Dept. of Commerce, Bureau of the Census, C. William Verity, Robert Ortner and John G. Keane) for an order to stay discovery or for summary judgment. 12-19-88rc

DATE	NR.	PROCEEDINGS
1988		
12/16	12	DEFT'S NOTICE OF MOTION to dismiss action for want of jurisdiction filed. 12-19-88rc
12/16	13	DEFT'S, U.S. Dept. of Commerce, Bureau of the Census, C. William Verity, Roberr [*sic*] Ortner and John Keanes' NOTICE OF MOTION ret. 1/11/89 to dismiss complaint or to grant deft's summary judgment pursuant to Fed. R. Civ. P. 56. 12-19-88rc
12/16	14	Deft's Statement of Material Facts as to Which There is No Genuine Issue filed. 12-19-88rc
12/16	15	Deft's MEMORANDUM OF LAW In Support of Motion to Dismiss or for Summary Judgment and in Opossition [*sic*] to Pltff's Motion for Preliminary Injunction. 12-19-88rc
		* * * *
1/13	23	Statement Pursuant to Local Rule 3(g) in Opposition to Deft's motion to Dismiss. 1/13/89rc
		* * * *
1/13	25	Memorandum of Law in Support of Opposition to Deft's Motion for Summary Judgement. 1/13/89rc
		* * * *
1989		
1/26	28	Deft's Reply Memorandum in further Support of deft's motion for dismissal or for s/j. 1/27/89
		* * * *
2/14	30	STIPULATION by McLaughlin, J. dated 2/9/89 Regarding Participation of Donald K. Anderson. (see order for mor [*sic*] detail). 2/14/89rc

DATE	NR.	PROCEEDINGS
1989		
2/15	31	ORDER by McLaughlin, J. dtd 2/10/89. re: Deft's motion for an order dismissing the complaint. The Court is compelled to conclude that it must exercise its discretion and "require pltff(s) to supply by affidavits, further particularized allegations of fact deemed supportive (pltff's) standing. It is hereby ORDERED that pltffs submit on or before 2/24/89 affidavits or other competent evidence that support their allegations of fact on this issue of standing. The clerk shall make copies and serve them upon the parties. 2/15/89rc
		* * * *
3/10	39	Affidavits in Response to Court's 2/10/89 Order on the Issue of Standing. 3/13/89rc
3/10	40	Pltff's Memorandum in Response to the Court's Order of 2/10/89 on the Issue of Standing. 3/13/89rc
		* * * *
3/21	44	Affidavit in Response to Court's February 10, 1989 Order on the issue of Standing. 3/21/89rc
3/28	45	Deft's Memorandum in Response to Pltff's Memorandum in Response to Court's Order 2/10/89 on standing. 3/28/89rc
5/31	46	Plaintiffs Reply Memo in response to the Court's Order dtd 2/10/89 on the issue of standing, filed. (ent'd 4/489) mji
		* * * *

DATE	NR.	PROCEEDINGS
1989		
4/27	50	MEMORANDUM & ORDER dtd 4/21/89 by McLaughlin, J. denying deft's motion to dismiss the complaint and denying motion for summary judgment. Pltff's may renew motion for preliminary injunction upon the completion of discovery. c/m 4/27/89rc
		* * * *
4/21	—	Before McLaughlin, J. case called for motion. All present. Mr. Harte is admitted pro hac vice. Det. motion to dismiss argued. decision entered on the record. Motion denied. Defts motion for summary judgment denied. Pltffs to renew motion for preliminary injunction upon completion of discovery. 5/10/89rc
		* * * *
5/16	54	ANSWER filed. 5/17/89rc
		* * * *
6/7	64	STIPULATION/ORDER dtd 6/6/89 by McLaughlin, J. The return date for defts' motion for reconsideration is moved to 7/7/89; pltffs' memorandum in opposition to defts' motion for reconsideration shall be served on 6/23/89; and defts; reply memorandum in support of their motion for reconsideration shall be served on 7/6/89. 6/8/89rc
		* * * *
6/28	82	STANDARD REFERRAL ORDER dated 6/21/89 by McLaughlin, J. referring case to MAG. CADEN for all purposes and to hear and decide defts' motion (1) to strike witnesses from pltffs' witness list and (2) to compel interrogatory answers; and (3) to quash subpoenas. 6/28/89rc
		* * * *

DATE	NR.	PROCEEDINGS
1989		
7/18	98	STIPULATION AND ORDER by J. McLaughlin dtd 7/17/89 re: all pending motions, including pltff's pending Motion for a Preliminary Injunction, are withdrawn. (Ent'd 7/18/89) mr
7/17	—	Before J. McLaughlin—Case called. Counsel for both sides present. Pltff's motion for preliminary injunction is withdrawn. Stipulations placed on the record. Permanent injunction motion is still pending but should be resolved. (ent'd 7-20-89) nm
		* * * *
1990		
4/11	104	Pltff, THE CITY OF NEW YORK, NOTICE OF MOTION ret. 4-26-90 for an order, for a declaratory judgment and other relief. 4-11-90rc
		* * * *
4/11	108	Memorandum of Law in Support of pltff's Motion for a Supplemental Order to Enforce the Court's 7-17-89 order and for Declaratory Judgment. 4-11-90rc
4/19	109	NOTICE OF MOTION by State of Texas to Intervene as Pltff. 4-20-90rc
4/19	110	Memorandum in Support of Texas' Motion to Intervene. 4-20-90rc
		* * * *
5/4	112	Defts' Opposition to Pltff's Motion for A supplemental Order to Enforce Court's 7-17-89 Order and or Declaratory Judgment filed. Notice of Filing and Administrative Records Volums IA, IB, IC, ID, IIA, IIB attached. 5-4-90rc
		* * * *

DATE	NR.	PROCEEDINGS
1990		
5/24	122	the City of Pheonix's MOTION TO INTERVENE & REQUEST FOR ORAL ARGUMENT. 5-25-90RC
5/24	123	The City of Pheonix's Memorandum In Support of Its Motion to Intervene. 5-25-90rc
		* * * *
6/7	127	Supplemental Stipulation and Order dtd 6-5-90 by McLaughlin, J., amending the Stipulation and Order of 7/17/90 (see stipulation for further details). 6-7-90rc
6/8	128	MEMORANDUM & ORDER dtd 6-7-90 by McLaughlin, J., that the motion for declaratory judgment is hereby granted with the understanding that statutory and constitutional concerns will remain relevant in regard to the final form of statistical adjustment. The motion for a supplemental order is granted in part and denied in part, as set forth herein (see memo & order for further details). 6-11-90rc
		* * * *
7/13	130	ORDER dtd 7-13-90 by McLaughlin, J., granting motion to intervene. (see 5-24-90) With no further outstanding motions in this case, the federal file on this matter will, again be administratively closed. C/m 7-16-90rc
		* * * *
7/20	132	TEXAS' COMPLAINT IN INTERVENTION filed. 7-20-90rc
		* * * *
1991		
3/20	138	Letter dtd 3-13-91 from Michael S. Bokar, Senior Deputy Atty General for the State of

DATE	NR.	PROCEEDINGS
1991		
		New Jersey, confirming that the State of New Jersey agrees to be bound by the strip & Order of this Court dtd 7-17-89, filed. eod-3-20-91 el
2/15	139	Notice of motion by the state of New Jersey to intervene as a plaintiff filed. eod-4-8-91 el
2/15	140	Memo of law in support of motion to intervene, filed. eod-4-8-91 el
4/3	141	The cities of Cleveland, Denver, Inglewood, Ca., New Orleans, Oakland, Pasadena, Philadelphia, San Antonio, San Francisco and Broward County Florida's motion to intervene as pltffs in this action, ret. 4-18-91 filed. eod-4-8-91 el
4/3	142	Affidavit of Robert Rifkind in support of motion to intervene on behalf of Cleveland, etc., filed. eod-4-8-91 el
4/3	143	Affidavits in support of motion to intervene, filed. eod-4-8-91 el
4/3	144	Memo of law in support of motion to intervene, filed. eod-4-8-91 el
4/8	145	BY MCLAUGHLIN, J—Order dtd 3-28-91 granting the State of New Jersey's motion to intervene, filed. c/m. eod-4-8-91 el
4/8	146	Complaint in intervention of State of New Jersey, filed. eod-4-8-91 el
		* * * *
4/30	151	BY MCLAUGHLIN J.—Order dtd 4-26-91 (and received in the District Court today), that pursuant to the Court's order of 7-13-90, the motion of the City of Cleveland, Ohio, et al to intervene is hereby granted, filed. cm eod-4-30-91 el
		* * * *

DATE	NR.	PROCEEDINGS
1991		
5/28	155	Notice of motion by state of Florida to intervene as pltff, filed. el
5/28	156	Memo of law in support of motion to intervene, filed. el
		* * * *
6/19	161	BY MCLAUGHLIN C.J.—Order dtd 6-18-91 that pursuant to the Court's order dtd 7-13-90, the motion by the State of Florida to intervene is granted, filed. cm el
		* * * *
7/17	165	The State of Wisconsin's notice of motion and motion to intervene as a deft filed. el
7/17	166	Memo in support of Wisconsin's motion to intervene, filed. Both doc. 165 & 166 sent to chambers. el-
		* * * *
7/29	173	State of Washington's motion to appear amicus, filed. el
7/29	174	Memo in support of motion to appear amicus curiae, filed. el
		* * * *
8/8	177	Defts' motion ret. 8-22-91 for an order of dismissal. ent 8/23 mg (Memo of Law in support attached)
		* * * *
8/19	179	Motion by the State of Arizona to intervene as a party pltff with memo in support attached. ent 8-23 mg
8/19	180	Defts' motion to strike notices of depositions of Robert A. Mosbacher; Michael Darby; and Barbara E. Bryant ret 8/27/91. ent 8-23 mg
		* * * *

DATE	NR.	PROCEEDINGS
1991		
8/20	184	Pltff's memo in opposition to defts' motion to dismiss. ent 8-23 mg
8/22	185	Motion by the cities of Long Beach, Ca.; SanJose, Ca.; Baltimore, Md.; Boston, Ma.; Counties of Los Angeles and San Bernardino, Ca.; the District of Columbia; and the Navajo Nation ret 9/6/91 for an order permitting intervention as pltffs. ent 8-23 mg
		* * * *
9/3	203	Certified copy of MANDATE FROM USCA issued 8/29/91. Petition for Writ of Mandamus is denied without prejudice to renewal after the District Court rules on an application for a protective order, petitioners have one week from the date hereof for a stay of deposition-pending a decision on a motion to be filed forthwith for a protective order. Depositions are stayed for the period (up to 1 week) until petitioners apply to the District Court for a stay of deposition. Judge notified. USCA #91-3045. (EOD 9/4/91) mamc
9/3	204	Certified copy of MANDATE FROM USCA issued 8/28/91. Motion for stay pending disposition of petition for Writ of Mandamus is considered to be moot in light of this Court order of 8/28/91. Judge notified USCA #91-3045. (EOD 9/4/91) mamc
9/17	205	By Judge McLaughlin dated 8/1/91, ordered, that this case be referred to Mag. Ross for all pretrial purposes; to hear and decide discovery disputes. ent. 9/17/91 sy
9/17	206	By Judge McLaughlin dated 9/3/91, ordered, that Arizona motion to intervene as a plaintiff is granted. ent 9/17/91 sy

DATE	NR.	PROCEEDINGS
1991		
9/17	207	By Judge McLaughlin dated 9/3/91, ordered, that the City of Baltimore; Boston; Long Beach; San Jose; Los Angeles; San Bernardino; the District of Columbia; and the Navajo Nation motion to intervene as plaintiffs is granted. ent 9/17/91 sy
		* * * *
9/9	209	Notice of motion by state of New Mexico to intervene as a plaintiff. ent 9/17/91 sy
9/9	210	Memorandum of law in support of motion to intervene by state of New Mexico. ent 9/17/91 sy
		* * * *
9/17	213	By Judge McLaughlin dated 9/10/91, ordered, that the State of Wisconsin motion to intervene as defendant is granted. ent 9/17/91 sy
9/16	214	Copy of order by Mag. Ross dated 9/16/91, that defendants' motion for a protective order is granted only insofar as it seeks to preclude the depositions of Secretary Mosbacher, Under Secretary Darby and Director Bryant. ent 9/17/91 sy
		* * * *
9/22	217	Federal defendants' memorandum on adjusted population estimates. ent 9/23/91 sy Attached with the letter dated 9/20/91 from Thomas Millet to Judge McLaughlin.
		* * * *
9/23	221	By Judge McLaughlin dated 9/19/91, ordered, that the defendants' motion to dismiss is DENIED. ent 9/23/91 sy

DATE	NR.	PROCEEDINGS
1991		
9/23	222	By Judge McLaughlin dated 9/23/91, ORDERED, that defts' motion to move forthwith before the second circuit for a stay of depositions is GRANTED. ent 9/26/91 sy
9/24	223	ORDERED by Judge McLaughlin dated 9/24/91 that the state of New Mexico's motion to intervene as a plaintiff is GRANTED; and also GRANTED New Mexico's motion to appear pro hac vice. ent'd 10/8/91 sy
		* * * *
10/24	225	CERTIFIED COPY OF MANDATE from the USCA DENYING the Writ of Mandamus. Issued as mandate on 10-22-91. Ackn mailed. Judge notified. USCA # 91-3047. (EOD 10-24-91) mcg
10/10	226	ORDERED, by Mag. Ross dated 10/10/91 that plaintiff should be given access to the corrected redistricting tapes. ent'd 10/24 sy
10/15	227	City of Tucson's complaint in intervention filed. ent'd 10/24 sy
10/15	228	City of Tucson's memorandum in support of its motion to intervene filed. ent'd 10/24/91 sy
10/15	229	City of Tucson's motion to intervene and notice of motion filed ent'd 10/24/91 sy
		* * * *
10/23	233	Motion by State of Oklahoma to intervene as a defendant. ent'd 10/24 sy
10/23	234	Memorandum in support of motion to intervene by the State of Oklahoma. ent'd 10/24 sy

DATE	NR.	PROCEEDINGS
1991		
10/25	235	AN ORDER from USCA DENYING the governments motion for Stay of Depositions Pending Disposition for Petition for Writ of Certiorari filed at the USCA on 10-23-91. Judge notified. Ackn mailed. (EOD 10-25-91) mcg
		* * * *
11/14	254	Before Mag. Ross on 11/14 at 4:30. (1) Briefing schedule on motion for Mosbacher Dep: answer on 11/19; reply on 11/21. (2) Briefing schedule on motion to compel responses to questions concerning compilation of administrative record: answer by 11/22; reply by 11/2 (3) Parties meeting to negotiate defts' "contention interrogatories" (4) Ey 11/19, if possible, defts' to submit appropriate evidentiary basis for assertion of attorney/cient privilege in connection with 7/2/91 meeting; (5) Sear deposition may proceed, depending upon witness's availability, to be determined by deft's counsel.
11/15	255	Before Mag. Ross on 11/15 at 5:00, ORDERED, that plaintiffs' deposit of Fr. Wilkie may proceed, with its scope to be limited to the following issues: —any possible White House involvement with the adjustment decision and communications between the Dept. of Commerce and the White House or White House counsel on that issue; —Fr. Wilkie possible authorship of the Qs and As about which Dr. Plant was questioned; and—foundational questions concerning defts' assertion of the attorney-client privilege with respect to the 7/2/91 meeting. ent'd 11/18 smy

DATE	NR.	PROCEEDINGS
1991		
11/15	256	ORDERED, by Mag. Ross dated 11/15: As Judge McLaughlin previously rules, the issue of possible interference in the adjustment decision is an appropriate one for discovery at this stage of the case. The record developed during the Swanson deposition—both by Fr. Wilkie's testimony & by certain of the documents produce—clearly establish that Fr. Wilkie has personal knowledge on this issue having communicated concerning it not only with Swanson but also with Deputy White House Counsel John Schoritz and W.H. Counsel Boyden Grey. That, as defts point out, Fr. Willkie's communications on this issue were occasioned by the performance of his duties does not detruct from the appropriateness of discovery concerning those communications. Thus the evidence of Fr. Willkie's personal knowledge of this issue comply with the significance and appropriateness of the issue for exploration at this stage of the proceeding and the clear waiver of any privilege with regard to these particular communications (that is, between W.H. and commerce dept personnel concerning the adjustment issue) establish adequate necessity for his deposition on this limited issue, notwithstanding his senior position at the commerce dept. On the other hand, pltfs' have not established it. (See file) smy
		• • • •
11/25	264	Notice of MOTION by County of Hudson to intervene as plaintiff, returnable on 12/13/91 at 9:30. ent'd 11/27 smy (Attached mem. in support and aff. of Lawrence Berman)
		• • • •

DATE	NR.	PROCEEDINGS
1991		
11/26	266	Memorandum and ORDER by Mag. Ross dated 11/26/91, that the request for the deposition of Robert Mosbacher is DENIED. smy
11/26	267	Notice of appeal by deft of Mag. Ross's order of 11/15/91 filed, ent'd 12/3/91 smy
		* * * *
12/5	274A	Ordered, by Judge McLaughlin dtd 12/3/91, granting motion by Los Angeles to appear pro hac vice. ent'd 12/6 sy
		* * * *
12/5	275A	Ordered, by Judge McLaughlin dtd 12/3/91, that city of Tucson, Arizona motion to intervene as a plaintiff and to appear pro hac vice is granted. ent'd 12/6 sy
		* * * *
12/5	276A	Ordered, by Judge McLaughlin dtd 12/3/91, that the state of Oklahoma's motion to intervene as a deft is granted. ent'd 12/6 sy
1992		
		* * * *
1/21	282	Ordered, by Judge McLaughlin dtd 1/21/92, that the motion by County of Hudson, New Jersey to intervene as a plaintiff is granted. ent'd 1/24/92 sy
		* * * *
2/11	——	Administrative record received from Judry Subar with cover letter dtd 2/6/92 (in boxes) ent'd 2/11/92 sy
2/18	285	Order, by Judge McLaughlin dtd 2/18/92, that this Court will conduct an evidentiary hearing. ent'd 2/20/92 sy c/m

DATE	NR.	PROCEEDINGS
1992		
2/19	286	Before Judge McLaughlin on 2/19/92 for conference. Case called. All counsel present. Conf. held. Deposition's to completed by 4/24/92. Next conf. set for 2/21/92 at 11:00 by phone. Trial set for 5/11/92. Plaintiffs' witness list served by 3/2/92. Dft's witness list served by 3/9/92. Dft intervenor Wisconsin will serve pre-trial brief on question of legality of an adjustment. ent'd 2/28/92 sy
2/21	287	Before Judge McLaughlin on 2/21/92 for conf. by phone. Case called. Plaintiff's response to summary judgment motion of dfts due no later than 5/1/92. Pretrial submissions (due 5/1/92) limited to (1) pre-trial briefs, (2) documents categorized and marked by witness, (3) expert C.V.'s. Scope of trial will be broad; plaintiffs must prove abuse discretion. Dfts to respond to plaintiffs' evidence as they see fit. ent'd 2/28/92 sy
		• • • •
3/19	292	ORDER, by Judge McLaughlin dtd 3/16/92, that the request for State of Washington to appear as *amicus curiae* is granted to the limited extent that Washington may interpose an amicus brief re dfts' presently outstanding motion for summary judgment. The brief is to be filed no later than 4/6/92. The State of Washington may also interpose a pre-trial brief no later than 5/1/92 en'td 3/19 sy
3/19	293	Notice of Filing by dtfts re: recent decision by the U.S. Court of Appeals for the 7th Circuit. ent'd 3/24 sy
		• • • •

DATE	NR.	PROCEEDINGS
1992		
3/30	300	Answer in intervention of the State of Oklahoma, Ex Rel. Susan Loving, attorney general of Oklahoma to amended complaint. (rnt'd 3/30/92) sy
3/31	301	Memorndum of Law in SUPPORT of plaintiffs' Motion In Limine filed. (ent'd 3/31/92) sy Exhibits A-J attached.
3/31	302	Plaintiffs' notice of MOTION in limine for an order precludindg dfts from offering at trial evidence created after 7/15/91. (ent'd 4/1/92) sy
4/2	303	Plaintiffs' amended notice of motion in limine filed. (ent'd 4/3/92) sy
		* * * *
4/9	308	ORDER by Judge McLaughlin dtd 4/7/92, that the dft's motion in limine to preclude the trial testimony of Robert Mosbacher is *granted.* With one limitation, if, during the course of the hearing, the plaintiff can make a showing of bad faith sufficient to warrant the introduction of Mr. Mosbacher's testimony, they may, at that time, seek a reconsideration of this order. c/m (ent'd 4/9/92) sy
4/15	309	ORDER by Judge McLaughlin dtd 4/9/92, that the dfts' request for reconsideration of their motion to dismiss is DENIED. c/m (ent'd 4/15/92) sy
		* * * *
4/27	317	Motion by the Council of the Great City Schools to intervene as plaintiff. Motion returnable on 5/11/92 at 9:30. (ent'd 4/28/92) sy

DATE	NR.	PROCEEDINGS
1992		
4/27	318	Memorandum in support of motion to intervene filed by The Council of the Great City Schools. (ent'd 4/28/92) sy
		* * * *
4/30	321	Notice of joinder in opening trial memorandum and support of arguments presented by plaintiff City of N.Y. filed. (ent'd 5/4/92) sy
		* * * *
5/1	323	Order by Judge McLaughlin dtd 4/27/92, summarizing the Court orders that : (1) the plaintiffs' motion to preclude the dfts from introducing at trial documents created after July 15, 91 is DENIED; (2) the plaintiffs' motion for reconsideration of the Court's order of 3/24/92 is DENIED; and (3) *Florida House of Representatives v. Mosbacher* is hereby consolidated with this action. (ent'd 5/4/92) sy C/S
		* * * *
5/4	325	Trial brief of dft-intervenor The State of Oklahoma filed. (ent'd 5/4/92) sy
		* * * *
5/4	327	Plaintiffs' trial brief filed. (ent'd 5/5/92) sy
5/4	328	Plaintiffs' statement pursuant to rule 3(g) filed. (ent'd 5/5/92) sy
5/5	329	Dfts' trial brief filed. (ent'd 5/5/92) sy
5/5	330	Brief of dft-intervenor State of Wisconsin in opposition to statistical adjustment of the 1990 decennial census filed. (ent'd 5/5/92) sy
		* * * *
5/11	332	Ordered, by Judge McLaughlin dtd 5/6/92, consolidating case 88-cv-3474 and 92-cv-1566. Copies mailed. (ent'd 5/11/92) sy

DATE	NR.	PROCEEDINGS
1992		
5/11	333	Ordered, by Judge McLaughlin dtd 5/8/92, that the dfts' motion for summary judgment is denied. C/m (ent'd 5/11/92) sy
		* * * *
5/18	335	Order, by Judge McLaughlin dtd 5/12/92, that the Council of the Great City Schools' motion to intervene as a plaintiff is *granted.* C/M (ent'd 5/19/92) sy
5/19	336	Notice of adoption of plaintiffs' trial brief filed. (ent'd 5/19/92) sy
		* * * *
7/2	342	Dfts' proposed findings of fact and conclusion of law filed. (ent'd 7/2/92) sy
7/2	343	Dfts' post-trial brief filed. (ent'd 7/2/92) sy
7/3	344	Plaintiffs' proposed findings of fact and conclusion of law filed. (ent'd 7/7/92) sy
7/3	345	Plaintiffs' post-trial brief filed. (ent'd 7/7/92) sy
7/3	346	State of California's post-trial statements filed. (ent'd 7/7/92) sy
7/14	347	Dft-intervenor State of Oklahoma's *post-trial statement* filed. (ent'd 7/14/92) sy
7/30	348	Plaintiff County of Hudson's proposed findings of fact and conclusion of law filed. (ent'd 7/30/92) sy
7/30	349	Plaintiff Hudson County's post trial brief filed. (ent'd 7/30/92) sy
7/30	350	Dft's REPLY to plaintiff's post trial brief filed. (ent'd 7/30/92) sy
7/30	351	Plaintiffs' Post-trial reply brief filed. (ent'd 7/31/92) sy

DATE	NR.	PROCEEDINGS
1992		
7/31	352	Order by Judge McLaughlin dtd 7/20/92: (1) that the letters from both sides expanding upon and explaining certain representations made by defense counsel at trial are admitted; (2) PX 836, 649, 652, 780 are admitted; (3) PX 781 is admitted; (4) PX 782 & 783 are admitted; and (5) the depositions and deposition exhibit designations submitted by the parties are admitted with the exception of the Verity testimony discussed. So. Ordered. (entered 7/31/92) sy c/m
		* * * *
8/18	355	Letter dtd 8/17/92 from Michael Sitcov to Judge McLaughlin enclosing a copy of the recent decision in *City of Detroit, et al. v. Franklin, et al.* (Copy attached) (ent'd 8/20/92) sy
		* * * *
1991		
11/25	368	Complaint in intervention of County of Hudson filed. (ent'd 8/21/92) sy
2/7	369	Notice of Motion by dfts for summary judgment. Motion returnable on 3/27/92 at 9:30. (ent'd 8/21/92) sy
2/7	370	Memorandum of points and authorities in support of dfts' motion for summary judgment. (ent'd 8/21/92) sy
		* * * *
1993		
4/13	364	By Judge Joseph M. McLaughlin, dated April 13, 1993, MEMORANDUM & ORDER finding that the Secretary's decision not to adjust the 1990 census does not violate the APA, the

DATE	NR.	PROCEEDINGS
1993		
		Constitution, the Stipulation, or any statute; and the Court vacates the protective order governing the pltfs.' use of the computer tapes containing the adjusted block-level counts. The Court on the record before it, supplant the Secretary's decision. c/m (Entered on docket on 4/13/93) . . . tv
5/4	375	JUDGMENT: that the Court finds that the Secretary's decision not to adjust the 1990 census does not violate the APA, the Constitution, the Stipulation, or any statute; and, that the protective order governing the plaintiffs' use of the computer tapes containing the adjusted block-level counts is vacated. (Signed by Clerk of Court, Robert Heinemann, dated 5/3/93) ent'd 5/4/93) sy
		Case Closed.
7/6	376	NOTICE of Appeal filed by Plaintiffs/Appellants from the Judgment entered on 5/4/93. C of A filing fee paid/receipt #153080. AFF of service attached. C of A notified. (EOD 7/6/93) mcg
8/6	377	SCHEDULING ORDER from USCA filed. Record due 8/27/93. Appellant's brief due 9/3/93. Brief of Appellees due 10/4/93. Argument of the appeal to be heard 10/25/93. USCA #93-6183. mam
		* * * *
9/17		RECORD CERTIFIED & sent to the USCA. Ackn requested. (EOD 9/17/93) mcg
		* * * *
9/22	——	CERTIFIED & Send to the USCA a copy of (INDEX) for the first supplemental record. Ackn requested. (EOD 9/22/93) mcg

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 92-CV-1566

THE CITY OF ATLANTA, ET AL., PLAINTIFFS

v.

MOSBOCHER, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4/2/92	1	Original file, certified copy of transfer order and docket sheet received from District of Georgia, Northern District (jf) [Entry date 04/21/92]
5/11/92	—	ORDER, consolidating cases with lead case 88-cv-3474 (signed by Judge Joseph M. McLaughlin) (88-cv-3474—docket sheet) (sy) [Entry date 07/02/92]
5/11/92	—	Consolidated Member Case. Lead Case Number: 1cv88 3474 (sy) [Entry date 07/02/92]
5/11/92	—	Case closed (sy) [Entry date 07/02/92]
5/10/93	1	JUDGMENT for Bureau of the Census against City of Atlanta, Maynard Jackson: Ordered and Adjudged that the Court finds that the Secretary's decision not to adjust the 1990 census does not violate the APA, the Constitution, the Stipulation, or any statute; and the protective order governing pltffs' use of the computer tapes containing the adjusted block-level counts is vacated. (signed by Robert Heinemann) (dj) [Entry date 05/12/93]

DATE	NR.	PROCEEDINGS
6/24/93	2	Letter dated 6/17/93 from U.S. District Court for the Northern District of Georgia, Atlanta Division, to the Clerk, NY-E, stating that pursuant to the Court's order dated 2/24/92, they transferred their action to us. However, at the time the original record was not accessible and a duplicate was transmitted. Now, enclosed is the original file. (tv)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 92-CV-2037

FLORIDA HOUSE OF REPRESENTATIVES, ET AL.,
PLAINTIFFS

v.

MOSBACHER, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
5/1/92	1	Original file, certified copy of transfer order and docket sheet received from District of Florida, Tallahassee Division Northern Division (jf) [Entry date 05/07/92]
5/1/92	—	ORDER, consolidating cases with lead case 88-cv-3474 (docket sheet). (signed by Judge Joseph M. McLaughlin, dtd 4/27/92). See document #323 in 88-cv-3474. (sy) [Entry date 07/02/92]
5/1/92	—	Consolidated Member Case. Lead Case Number: 1cv88 3474 (sy) [Entry date 07/02/92]
5/1/92	—	Case closed (sy) [Entry date 07/02/92]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 93-6183

THE CITY OF NEW YORK, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/8/93	Copy of district court docket entries and notice of appeal on behalf of Appellant City of NY, Appellant State of NY, Appellant Daniel E. Lungren, Appellant City Of Los Angeles, Appellant City Of Chicago, Appellant Dade County, Florida, Appellant U.S. Conference, Appellant National League, Appellant League Of United, Appellant NAACP, Appellant Marcella Maxwell, Appellant Donald H. Elliott, Appellant John Mack, Appellant Olga Morales, Appellant Timothy W. Wright, Appellant Raymond G. Romero, Appellant Antonio Gonzales, Appellant Athalie Range, Appellant State Of Texas, Appellant City Of Phoenix, Appellant State Of New Jersey, Appellant State Of Florida, Appellant City Of Cleveland, Appellant City Of Denver, Appellant City Of Inglewood, Appellant City Of New Orleans, Appellant City Of Oakland, Appellant City Of Pasadena, Appellant City Of Philadelphia, Appellant City Of San Antonio, Appellant City Of

DATE	PROCEEDINGS
	San Fran, Appellant Broward County, Appellant State Of Arizona, Appellant City Of Baltimore, Appellant City Of Boston, Appellant City Of Long Beach, Appellant City Of San Jose, Appellant Los Angeles County, Appellant San Bernadino County, Appellant District Of Columbia, Appellant Navajo Nation, Appellant State Of New Mexico, Appellant City Of Tucson, Appellant Council Of Great, Appellant City Of Atlanta, Appellant Maynard Jackson, Appellant Florida House, Appellant Florida State, Appellant Miguel A. De Grandy, Appellant Willye Dennis, Appellant Mario Diaz-Blancart, Appellant Charles Evans, Appellant Rodolfo Garcia, Appellant Bollowy L. Johnson, Appellant Alfred J. Lawson, Appellant Willis Logan, Appellant Johnnie McMillan, Appellant Alzo J. Reddick, Appellant Peter Rudy Wallace, Appellant T. K. Wetherell filed. [93-6183] Form C due on 7/16/93. Form D due on 7/16/93. (com)
7/16/93	Appellant City of NY, Appellant State of NY, Appellant Daniel E. Lungren, Appellant City Of Los Angeles, Appellant City Of Chicago, Appellant Dade County, Florida, Appellant U.S. Conference, Appellant National League, Appellant League Of United, Appellant NAACP, Appellant Marcella Maxwell, Appellant Donald H. Elliott, Appellant John Mack, Appellant Olga Morales, Appellant Timothy W. Wright, Appellant Raymond G. Romero, Appellant Antonio Gonzales, Appellant Athalie Range, Appellant State Of Texas, Appellant City Of Phoenix, Appellant State Of New Jersey, Appellant State Of Florida, Appellant City Of Cleveland, Appellant City Of Denver, Appellant City Of Inglewood, Appellant City Of New Orleans, Appellant City Of Oakland, Appellant City Of Pasadena, Appellant City Of Philadelphia, Appellant City Of San Antonio, Appellant City Of San

DATE	PROCEEDINGS
	Fran, Appellant Broward County, Appellant State Of Arizona, Appellant City Of Baltimore, Appellant City Of Boston, Appellant City Of Long Beach, Appellant City Of San Jose, Appellant Los Angeles County, Appellant San Bernadino County, Appellant District Of Columbia, Appellant Navajo Nation, Appellant State Of New Mexico, Appellant City Of Tucson, Appellant Council Of Great, Appellant City Of Atlanta, Appellant Maynard Jackson, Appellant Florida House, Appellant Florida State, Appellant Miguel A. De Grandy, Appellant Willye Dennis, Appellant Mario Diaz-Blancart, Appellant Charles Evans, Appellant Rodolfo Garcia, Appellant Bollowy L. Johnson, Appellant Alfred J. Lawson, Appellant Willis Logan, Appellant Johnnie McMillan, Appellant Alzo J. Reddick, Appellant Peter Rudy Wallace, Appellant T. K. Wetherell Form C filed, with proof of service. [93-6183] Form C deadline satisfied. (com)
7/16/93	Appellant City of NY, Appellant State of NY, Appellant Daniel E. Lungren, Appellant City Of Los Angeles, Appellant City Of Chicago, Appellant Dade County, Florida, Appellant U.S. Conference, Appellant National League, Appellant League Of United, Appellant NAACP, Appellant Marcella Maxwell, Appellant Donald H. Elliott, Appellant John Mack, Appellant Olga Morales, Appellant Timothy W. Wright, Appellant Raymond G. Romero, Appellant Antonio Gonzales, Appellant Athalie Range, Appellant State Of Texas, Appellant City Of Phoenix, Appellant State Of New Jersey, Appellant State Of Florida, Appellant City Of Cleveland, Appellant City Of Denver, Appellant City Of Inglewood, Appellant City Of New Orleans, Appellant City Of Oakland, Appellant City Of Pasadena, Appellant City Of Philadelphia, Appellant City Of San Antonio, Appellant City Of San Fran, Appellant Broward County,

DATE	PROCEEDINGS
	Appellant State Of Arizona, Appellant City Of Baltimore, Appellant City of Boston, Appellant City Of Long Beach, Appellant City Of San Jose, Appellant Los Angeles County, Appellant San Bernadino County, Appellant District Of Columbia, Appellant Navajo Nation, Appellant State Of New Mexico, Appellant City Of Tucson, Appellant Council Of Great, Appellant City Of Atlanta, Appellant Maynard Jackson, Appellant Florida House, Appellant Florida State, Appellant Miguel A. De Grandy, Appellant Willye Dennis, Appellant Mario Diaz-Blancart, Appellant Charles Evans, Appellant Rodolfo Garcia, Appellant Bollowy L. Johnson, Appellant Alfred J. Lawson, Appellant Willis Logan, Appellant Johnnie McMillan, Appellant Alzo J. Reddick, Appellant Peter Rudy Wallace, Appellant T. K. Wetherell Form D filed, with proof of service. [93-6183] Form D deadline satisfied. (com)
8/4/93	Scheduling order #1 filed. Record on appeal due on 8/27/93. Appellant's brief and appendix due on 9/3/93. Appellee's brief due on 10/4/93. Argument as early as week of 10/25/93. (Pre-Argument Conference scheduled for 8/18/93 @ 3:45 pm). (coc)
8/13/93	Appellant State of NY motion to extend time to file brief and appendix FILED (w/pfs). [423941-1] (ond)
8/18/93	New scheduling order number #2 filed. New record on appeal due date is 9/17/93. New appellant's brief due date is 9/24/93. New appellee's brief due date is 10/25/93. New argument week as early as 11/15/93. (ond)
8/25/93	Order FILED MOOTING motion for extended time; in light of the scheduling order dated 18 August 1993 [423941-1] by Appellant State of NY, on motion dated 8/13/93. (ond)

DATE	PROCEEDINGS
9/22/93	Notice of appearance form on behalf of Peter C. Anderson, Esq., received. (Orig. to Calendar) (rsk)
9/22/93	Notice of appearance form on behalf of Gretchen A. Harris, Esq., received. (Orig. to Calendar) (rsk)
9/23/93	The CAPTION PAGE for this appeal has been AMENDED. (com)
9/23/93	Record on appeal index in lieu of record filed, 88-cv-3474, 92-cv-1566, 92-cv-2037. (ond)
9/23/93	First supplemental index in lieu of supplemental record filed. (ond)
9/24/93	The CAPTION PAGE for this appeal has been AMENDED. (PER KB INSTRUCTION) (coa)
9/24/93	Appellants City of NY, State of NY, City Of Los Angeles, City Of Chicago, Dade County, Florida, U.S. Conference, National League, League Of United, NAACP, Marcella Maxwell, Donald H. Elliott, John Mack, Olga Morales, Timothy W. Wright, Raymond G. Romero, Antonio Gonzales, Athalie Range, State Of Texas, City Of Phoenix, State Of New Jersey, State Of Florida, City Of Cleveland, City Of Denver, City Of Inglewood, City Of New Orleans, City Of Oakland, City Of Pasadena, City Of Philadelphia, City Of San Antonio, City Of San Fran, Broward County, State Of Arizona, City Of Baltimore, City Of Boston, City Of Long Beach, City Of San Jose, Los Angeles County, District Of Columbia, Navajo Nation, State Of New Mexico, City Of Tucson, Council Of Great, City Of Atlanta, Maynard Jackson, Florida House, Florida State, Miguel A. De Grandy, Willye Dennis, Rodolfo Garcia, Alfred J. Lawson, Willis Logan, Johnnie McMillan, Alzo J. Reddick, Peter Rudy Wallace, T. K. Wetherell, Mario Diaz-Balart, San Bernardino, Bollowy L. "Bo" Johnson,

DATE	PROCEEDINGS
	Charles Evans, San Bernardino County brief FILED with proof of service. (ond)
9/24/93	Appellants City of NY, State of NY, City Of Los Angeles, City Of Chicago, Dade County, Florida, U.S. Conference, National League, League Of United, NAACP, Marcella Maxwell, Donald H. Elliott, John Mack, Olga Morales, Timothy W. Wright, Raymond G. Romero, Antonio Gonzales, Athalie Range, State Of Texas, City Of Phoenix, State Of New Jersey, State Of Florida, City Of Cleveland, City Of Denver, City Of Inglewood, City Of New Orleans, City Of Oakland, City Of Pasadena, City Of Philadelphia, City Of San Antonio, City Of San Fran, Broward Ccunty, State Of Arizona, City Of Baltimore, City Of Boston, City Of Long Beach, City of San Jose, Los Angeles County, District Of Columbia, Navajo Nation, State Of New Mexico, City Of Tucson, Council Of Great, City Of Atlanta, Maynard Jackson, Florida House, Florida State, Miguel A. De Grandy, Willye Dennis, Rodolfo Garcia, Alfred J. Lawson, Willis Logan, Johnnie McMillan, Alzo J. Reddick, Peter Rudy Wallace, T. K. Wetherell, Mario Diaz-Balart, San Bernardino, Bollowy L. "Bo" Johnson, Charles Evans joint appendix filed w/pfs. (ond)
9/24/93	Notice of appearance form on behalf of Mark B. Stern Esq., received. (Orig. to Calendar) (rsk)
9/24/93	Notice of appearance form on behalf of Peter Zimroth Esq., received. (Orig. to Calendar) (rsk)
9/27/93	Letter regarding oral argued received, cc: to calendar. (ond)
9/27/93	Notice of appearance form on behalf of Peter C. Anderson, Esq., received. (Orig. to Calendar) (rsk)
10/12/93	Appellees Donald K. Anderson, State Of Oklahoma, State Of Wisconsin, Richard W. Riley, Federico

DATE	PROCEEDINGS
	Pena, Robert B. Reich, Henry Cisneros, Donna E. Shalala, Michael Espy, William J. Clinton, Barbara Everitt Bryant, Bureau Of Census, Michael R. Darby, Ronald H. Brown, U.S. DOC motion to extend time to file brief and appendix FILED (w/pfs). [443416-1] (ond)
10/20/93	Order FILED GRANTING motion for extended time [443416-1] by Appellee Donald K. Anderson, State Of Oklahoma, State Of Wisconsin, Richard W. Riley, Federico Pena, Robert B. Reich, Henry Cisneros, Donna E. Shalala, Michael Espy, William J. Clinton, Barbara Everitt Bryant, Bureau Of Census, Michael R. Darby, Ronald H. Brown, U.S. DOC, endorsed on motion form dated 10/12/93. Extended appellee's brief due date is 11/8/93. Extended argument week as early as 11/22/93 (ond)
11/8/93	Appellee State Of Oklahoma, Appellee State Of Wisconsin brief filed with proof of service. (ond)
11/9/93	Appellees Donald K. Anderson, Richard W. Riley, Federico Pena, Robert B. Reich, Henry Cisneros, Donna E. Shalala, Michael Espy, William J. Clinton, Barbara Everitt Bryant, Bureau Of Census, Michael R. Darby, Ronald H. Brown, U.S. DOC brief filed with proof of service. (ond)
11/10/93	Proposed for argument the week of 1/3/94. (car)
11/16/93	Appellants T. K. Wetherell, Peter Rudy Wallace, Alzo J. Reddick, Johnnie McMillan, Willis Logan, Alfred J. Lawson, Bollowy L. "Bo" Johnson, Rodolfo Garcia, Charles Evans, Mario Diaz-Balart, Willye Dennis, Miguel A. De Grandy, Florida State, Florida House, Maynard Jackson, City Of Atlanta, Council Of Great, People of State, County Of Hudson, City Of Tucson, State Of New Mexico, Navajo Nation, District Of Columbia, ant San

DATE	PROCEEDINGS
	Bernardino, Los Angeles County, City Of San Jose, City Of Long Beach, City Of Boston, City Of Baltimore, State Of Arizona, Broward County, City Of San Fran, City Of San Antonio, City Of Philadelphia, City Of Pasadena, City Of Oakland, City Of New Orleans, City Of Inglewood, City Of Denver, City Of Cleveland, State Of Florida, State Of New Jersey, City Of Phoenix, State Of Texas, Athalie Range, Antonio Gonzales, Raymond G. Romero, Timothy W. Wright, Olga Morales, John Mack, Donald H. Elliott, Marcella Maxwell, NAACP, League Of United, National League, U.S. Conference, Dade County, Florida, City Of Chicago, City Of Los Angeles, State of NY, City of NY, motion to extend time to file reply brief FILED (w/pfs). [456743-1] (ond)
12/1/93	Set for argument on 1/5/94. [93-6183] (car)
12/6/93	Appellant T. K. Wetherell, Appellant Peter Rudy Wallace, Appellant Alzo J. Reddick, Appellant Johnnie McMillan, Appellant Willis Logan, Appellant Alfred J. Lawson, Appellant Bollowy L. "Bo" Johnson, Appellant Rodolfo Garcia, Appellant Charles Evans, Appellant Mario Diaz-Balart, Appellant Willye Dennis, Appellant Miguel A. De Grandy, Appellant Florida State, Appellant Florida House, Appellant Maynard Jackson, Appellant City Of Atlanta, Appellant Council Of Great, Appellant City Of Tucson, Appellant State Of New Mexico, Appellant Navajo Nation, Appellant District Of Columbia, Appellant San Bernardino, Appellant Los Angeles County, Appellant City Of San Jose, Appellant City Of Long Beach, Appellant City Of Boston, Appellant City Of Baltimore, Appellant State Of Arizona, Appellant Broward County, Appellant City Of San Fran, Appellant City Of San Antonio, Appellant City Of Philadelphia, Appellant City Of Pasadena, Appellant City

DATE	PROCEEDINGS
	Of Oakland, Appellant City Of New Orleans, Appellant City Of Inglewood, Appellant City Of Denver, Appellant City Of Cleveland, Appellant State Of Florida, Appellant State Of New Jersey, Appellant City Of Phoenix, Appellant State Of Texas, Appellant Athalie Range, Appellant Antonio Gonzales, Appellant Raymond G. Romero, Appellant Timothy W. Wright, Appellant Olga Morales, Appellant John Mack, Appellant Donald H. Elliott, Appellant Marcella Maxwell, Appellant NAACP, Appellant League Of United, Appellant National League, Appellant U.S. Conference, Appellant Dade County, Florida, Appellant City Of Chicago, Appellant City Of Los Angeles, Appellant State of NY, Appellant City of NY reply brief received. Problem: awaiting motion from calendar.
12/7/93	Order FILED GRANTING motion for extended time [456743-1] by Appellant T. K. Wetherell, Peter Rudy Wallace, Alzo J. Reddick, Johnnie McMillan, Willis Logan, Jr., Alfred J. Lawson Jr., Bollowy L. "Bo" Johnson, Rodolfo Garcia Jr., Charles Evans, Mario Diaz-Balart, Willye Dennis, Miguel A. De Grandy, Florida State, Florida House, Maynard Jackson, City Of Atlanta, Council Of Great, People of State, County Of Hudson, City Of Tucson, State Of New Mexico, Navajo Nation, District Of Columbia, San Bernardino, Los Angeles County, City Of San Jose, City Of Long Beach, City Of Boston, City Of Baltimore, State Of Arizona, Broward County, City Of San Fran, City Of San Antonio, City Of Philadelphia, City Of Pasadena, City Of Oakland, City Of New Orleans, City Of Inglewood, City Of Denver, City Of Cleveland, State Of Florida, State Of New Jersey, City Of Phoenix, State Of Texas, Athalie Range, Antonio Gonzales, Raymond G. Romero, Timothy W. Wright III, Olga Morales, John Mack, Donald H.

DATE	PROCEEDINGS
	Elliott, Marcella Maxwell, NAACP, League Of United, National League, U.S. Conference, Dade County, Florida, City Of Chicago, City of Los Angeles, State of NY, City of NY, endorsed on motion form dated 11/16/93. Extended appellant's reply brief due on 12/6/93. (cao)
12/7/93	Appellants T. K. Wetherell, Peter Rudy Wallace, Alzo J. Reddick, Johnnie McMillan, Willis Logan, Alfred J. Lawson, Bollowy L. "Bo" Johnson, Rodolfo Garcia, Charles Evans, Mario Diaz-Balart, Willye Dennis, Miguel A. De Grandy, Florida State, Florida House, Maynard Jackson, City Of Atlanta, Council Of Great, City Of Tucson, State Of New Mexico, District Of Columbia, San Bernardino, Los Angeles County, City Of San Jose, City Of Long Beach, City Of Boston, City Of Baltimore, State Of Arizona, Broward County, City Of San Fran, City Of San Antonio, City Of Philadelphia, City Of Pasadena, City Of Oakland, City Of New Orleans, City Of Inglewood, City Of Denver, City Of Cleveland, State Of Florida, State Of New Jersey, City Of Phoenix, State Of Texas, Athalie Range, Antonio Gonzales, Raymond G. Romero, Timothy W. Wright, Olga Morales, John Mack, Donald H. Elliott, Marcella Maxwell, NAACP, League Of United, National League, U.S. Conference, Dade County, Florida, City Of Chicago, City Of Los Angeles, State of NY, City of NY reply brief filed with proof of service. Satisfy appellant's reply brief due. (cao)
1/5/94	Case heard before Timbers, Kearse, Leval, C.JJ. (TAPE: 101 & 102) (cag)
1/13/94	Record on appeal after index filed. (12 volumes) (ona)
1/13/94	First Supplemental Record on appeal after index filed. (ona)

DATE	PROCEEDINGS
1/13/94	First supplemental record on appeal after index filed. (ona)
2/18/94	Letter dated 2/18/94 received from New York City Law Department, in which David B. Goldin, Esq. advises the court of the inadvertant [*sic*] omission of the City of Houston as plaintiffs-appellants in the existing caption. Copy to Systems. (onw)
2/18/94	Letter dated 2/18/94 received from NYC Law Department, in which David B. Goldin advises of need for further correction as to existing caption. Copy to Systems. (onw)
2/22/94	The CAPTION PAGE for this appeal has been AMENDED. (unv)
3/1/94	The CAPTION PAGE for this appeal has been AMENDED. (unv)
3/8/94	Appellee U.S. DOC 28(J) letter received. (cc: panel) (ona)
8/8/94	Judgment of the district court is VACATED, AND THE MATTER IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION by published signed opinion filed per Judge Kearse. (ono)
8/8/94	Judgment filed. (ono)
8/8/94	Judge Timbers DISSENTING in a separate opinion filed. (ono)
8/12/94	Appellant U.S. Conference motion to extend time to file petition for rehearing en banc until 21 September 1994 FILED (w/pfs). [551453-1] (ond)
8/15/94	Appellee State Of Wisconsin motion to extend time to file petition for rehearing en banc and to include 21 September 1994 FILED (w/pfs). [551456-1] (ond)

DATE	PROCEEDINGS
8/17/94	Appellee State Of Oklahoma motion to extend time to file petition for rehearing en banc 21 September 1994 FILED (w/pfs). [551925-1] (ond)
8/19/94	Order FILED GRANTING motion for extended time to file petition for rehearing and suggestion en banc until 21 September 1994 [551453-1] by Appellant U.S. Conference, endorsed on motion form dated 8/12/94, ALK, CJ. (ond)
8/19/94	Order FILED GRANTING motion for extended time to file petition for rehearing and suggestion en banc until 21 September 1994 [551456-1] by Appellee State Of Wisconsin, endorsed on motion form dated 8/15/94, ALK, CJ. (ond)
8/19/94	Order FILED GRANTING motion for extended time to file petition for rehearing and suggestion en banc until 21 September 1994 [551925-1] by Appellee State Of Oklahoma, endorsed on motion form dated 8/17/94, ALK, CJ. (ond)
8/22/94	Appellee State Of Wisconsin Petition for rehearing and, petition for rehearing in banc [553163-2] with proof of service filed. (ond)
8/22/94	Appellants T. K. Wetherell, Peter Rudy Wallace, Alzo J. Reddick, Johnnie McMillan, Willis Logan, Alfred J. Lawson, Bollowy L. "Bo" Johnson, Rodolfo Garcia, Charles Evans, Mario Diaz-Balart, Willye Dennis, Miguel A. DeGrandy, Florida State, Florida House, Maynard Jackson, City Of Atlanta, Council Of Great, People of State, County Of Hudson, City Of Tucson, State Of New Mexico, Navajo Nation, District Of Columbia, San Bernardino, Los Angeles County, City Of San Jose, City Of Long Beach, City Of Boston, City Of Baltimore, State Of Arizona, Broward County, City Of San Fran, City Of San Antonio, City Of Philadelphia, City Of Pasadena, City Of Oakland, City Of New Orleans, City Of Inglewood, City Of Denver, City

DATE	PROCEEDINGS
	Of Cleveland, State Of Florida, State Of New Jersey, City Of Phoenix, State Of Texas, Athalie Range, Antonio Gonzales, Raymond G. Romero, Timothy W. Wright, Olga Morales, John Mack, Donald H. Elliott, Marcella Maxwell, NAACP, League Of United, National League, U.S. Conference, Dade County, Florida, City Of Chicago, City Of Los Angeles, State of NY, City of NY, City of Houston, Jerry Alan Wood, Carolyn Sue Lopez, itemized and verified bill of costs received. (ond)
9/20/94	Appellee State Of Oklahoma petition for rehearing received. Problem: Printing type is Point 12 proportional. (ag42)
9/21/94	Appellee State Of Oklahoma Petition for rehearing with suggestion of rehearing in banc [563734-2] with proof of service filed. (ag42)
9/22/94	Letter received from U.S. Dept. of Justice in regards to not filing a petition for rehearing. (ag42)
10/31/94	"IT IS HEREBY ORDERED that no costs are awarded at this time. In the event that plaintiffs ultimately prevail on the merits of their claims, the district court may award them the costs of the present appeal." (Hons. WHT, ALK & PNL, CJJs) (For the Court: AH) (ag42)
11/1/94	Certified copy of the Order not Awarding Costs at this time, dated 10/31/94, issued to the district court. (ag42)
12/12/94	Order FILED DENYING petition for REHEARING [563734-1] and petition for rehearing in banc [563734-2] by Appellee State Of Oklahoma. (ag42)
1/4/95	Order FILED DENYING petition for REHEARING [553163-1] and petition for rehearing in banc [553163-2] by Appellee State Of Wisconsin. (ag41)
1/13/95	Judgment MANDATE ISSUED. (ag41)

DATE	PROCEEDINGS
1/20/95	Mandate receipt returned from the district court. (ren)
3/30/95	Letter from Supreme Court informing the of extension of time to file petition for writ of certiorari received (ag41)
4/11/95	Notice of filing petition for writ of certiorari for Appellant City Of Oakland dated 14 April 1995 filed. Supreme Ct.#: 94-1631. (ag41)
4/28/95	Letter received from Clayton R. Higgins, Jr., dated April 25, 1995. Indicating, the application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on April 25, 1995, extended the time to and including June 3, 1995. (ag43)
6/9/95	Notice of filing petition for writ of certiorari for Appellee U.S. DOC dated 5 June 1995 filed. Supreme Ct.#: 94-1985. (ag41)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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88 Civ. 3474 (JMcL)

THE CITY OF NEW YORK, THE STATE OF NEW YORK, THE PEOPLE OF THE STATE OF CALIFORNIA *Ex Rel.* JOHN K. VAN DE KAMP, ATTORNEY GENERAL, THE CITY OF LOS ANGELES, THE CITY OF CHICAGO, THE CITY OF HOUSTON, DADE COUNTY, FLORIDA, THE U.S. CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MARCELLA MAXWELL, DONALD H. ELLIOTT, JOHN MACK, OLGA MORALES, TIMOTHY W. WRIGHT III, RAYMOND G. ROMERO, ANTONIO GONZALEZ, ATHALIE RANGE, JERRY ALAN WOOD, and CAROLYN SUE LOPEZ, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF COMMERCE, C. WILLIAM VERITY, as Secretary of the United States Department of Commerce, ROBERT ORTNER, as Under Secretary for Economic Affairs of the United States Department of Commerce, BUREAU OF THE CENSUS, JOHN G. KEANE, as Director of the Bureau of the Census, RONALD W. REAGAN, as President of the United States, and DONNALD K. ANDERSON, as Clerk of the United States House of Representatives, DEFENDANTS

AMENDED COMPLAINT

INTRODUCTION

1. This is an action under the Constitution and laws of the United States challenging the refusal of the federal government to conduct a fairer and more accurate decennial census in 1990.

2. The decennial census is one of the fundamental instruments for allocating political power in this country. It determines the apportionment of representatives in Congress and in state legislatures, the allocation of Electoral College votes in presidential elections, and the distribution among states and localities of billions of dollars of federal funds for housing, education, transportation, environmental protection, and other services. If the census is inaccurate, the apportionment of legislatures, the allocation of Electoral College votes, and the distribution of funds are necessarily distorted.

3. In 1990, the defendants will conduct the 21st decennial census. It is a certainty that, as now planned, the census will seriously undercount Blacks, Hispanics, and members of the disadvantaged groups. It will thus also seriously undercount the states and localities in which a disproportionate number of these individuals live.

4. Acknowledging the inevitability of this undercount, the Census Bureau determined in 1987 that it would prepare to use statistical techniques to correct the undercounts. Indeed, the Bureau began the preparations necessary to correct the 1990 census.

5. But the Commerce Department, which oversees the Bureau, then reversed the decision, prohibiting the Bureau from any further preparations for correction. The Commerce Department's action was not based on any legitimate technical or operational considerations, and the plaintiffs now ask the Court to require the defendants to correct in 1990.

6. This action arises under Article I, Section 2 of the Constitution; the Fifth and Fourteenth Amendments to

the Constitution; the laws of the United States relating to the census and the apportionment of representatives in Congress, 13 U.S.C. §§ 1 *et seq.* and 2 U.S.C. § 2a; and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

JURISDICTION AND VENUE

7. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337, and 1361, and 5 U.S.C. § 702. Declaratory relief is authorized by 28 U.S.C. §§ 2201-2202. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

8. Plaintiffs The State of New York and The State of California are entitled to a number of representatives in Congress pursuant to Article I, Section 2 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, based on "the whole number of persons" in the state. They are referred to collectively as the "plaintiff states"

9. Plaintiff The City of New York is a municipal corporation organized under the laws of the State of New York.

10. Plaintiff The City of Los Angeles is a municipal corporation and charter city organized under the laws of the State of California.

11. Plaintiff The City of Chicago is a municipal corporation organized under the laws of the State of Illinois.

12. Plaintiff The City of Houston is a municipal corporation organized under the laws of the State of Texas.

13. Plaintiff Dade County, Florida is a political subdivision of the State of Florida. Plaintiffs The City of New York, The City of Los Angeles, The City of Chicago, The City of Houston, and Dade County, Florida, are referred to collectively as the "plaintiff municipalities."

14. Plaintiff The U.S. Conference of Mayors is an organization of approximately 840 member mayors of cities with populations exceeding 30,000.

15. Plaintiff The National League of Cities is a membership organization representing approximately 16,000 cities through direct membership and membership in 49 affiliated state municipal leagues.

16. Plaintiff The League of United Latin American Citizens is the nation's largest and oldest Hispanic membership organization, serving the needs of Hispanic communities throughout the country.

17. Plaintiff The National Association for the Advancement of Colored People is the nation's largest and oldest civil rights membership organization, with more than 2200 branches, working for the political, social, and economic equality of all minorities.

18. Plaintiff Marcella Maxwell is a citizen of the United States, and a voter and taxpayer in the State and City of New York, residing in the 10th Congressional District, the 23rd State Senatorial District, and the 44th State Assembly District.

19. Plaintiff Donald H. Elliott is a citizen of the United States, and a voter and taxpayer in the State and City of New York, residing in the 13th Congressional District, the 25th State Senatorial District, and the 52nd State Assembly District.

20. Plaintiff John Mack is a citizen of the United States, and a voter and taxpayer in the State of California and the City of Los Angeles, residing in the 28th Congressional District, the 30th State Senatorial District, and the 49th State Assembly District.

21. Plaintiff Olga Morales is a citizen of the United States, and a voter and taxpayer in the State of California and the City of Los Angeles, residing in the 25th Congressional District, the 23rd State Senatorial District, and the 55th State Assembly District.

22. Plaintiff Timothy W. Wright III is a citizen of the United States, and a voter and taxpayer in the State of Illinois and the City of Chicago, residing in the 1st Congressional District, the 13th State Senatorial District, and the 25th State Representative District.

23. Plaintiff Raymond G. Romero is a citizen of the United States, and a voter and taxpayer in the State of Illinois and the City of Chicago, residing in the 9th Congressional District, the 2nd State Senatorial District, and the 3rd State Representative District.

24. Plaintiff Antonio Gonzalez is a citizen of the United States, and a voter and taxpayer in the State of Florida and the City of Miami, residing in the 17th Congressional District, the 33rd State Senatorial District, and the 109th State Representative District.

25. Plaintiff Athalie Range is a citizen of the United States, and a voter and taxpayer in the State of Florida and the City of Miami, residing in the 17th Congressional District, the 37th State Senatorial District, and the 101st State Representative District.

26. Plaintiff Jerry Alan Wood is a citizen of the United States, and a voter and taxpayer in the State of Texas and the City of Houston, residing in the 18th Congressional District, the 15th State Senatorial District, and the 137th State Representative District.

27. Plaintiff Carolyn Sue Lopez is a citizen of the United States, and a voter and taxpayer in the State of Texas and the City of Houston, residing in the 18th Congressional District, the 15th State Senatorial District, and the 143rd State Repersentative District.

28. Defendant United States Department of Commerce is a department of the federal government.

29. Defendant C. William Verity is the Secretary of the United States Department of Commerce. The Secretary is responsible under 13 U.S.C. § 141 for taking the decennial census, and has delegated that responsibility to the Director of the Bureau of the Census. The delegation

was made pursuant to Department Organization Order 35-2A of the United States Department of Commerce ("D.O.O. 35-2A"), amended most recently on July 24, 1987.

30. Defendant Robert Ortner is the Under Secretary for Economic Affairs of the United States Department of Commerce. Pursuant to D.O.O. 35-2A, the Under Secretary oversees the Director of the Bureau of the Census.

31. Defendant Bureau of the Census is an agency within the United States Department of Commerce.

32. Defendant John G. Keane is the Director of the Bureau of the Census. Pursuant to D.O.O. 35-2A, the Director is responsible for taking the decennial census.

33. Defendant Ronald W. Reagan is the President of the United States. Pursuant to 2 U.S.C. § 2a, the President calculates the number of representatives in Congress to which each state is entitled, based on the decennial census.

34. Defendant Donnald K. Anderson is the Clerk of the United States House of Representatives. Pursuant to 2 U.S.C. § 2a, the Clerk notifies each state of the number of representatives in Congress to which it is entitled.

LEGAL FRAMEWORK

35. Article I, Section 2 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, requires that representatives in Congress be apportioned according to population. For the purpose of determining population, Article I further requires that, every ten years, the United States government conduct the most accurate census practicable. These requirements are implemented by 2 U.S.C. § 2a, 13 U.S.C. § 141, and D.O.O. 35-2A.

36. Article II, Section 1 of the Constitution requires that the number of electors each state appoints to the Electoral College be equal to the number of representa-

tives and senators in Congress to which the state is entitled. This requirement is implemented by 3 U.S.C. § 3.

37. Pursuant to 13 U.S.C. § 141(b), each state is entitled to a number of representatives in Congress based on the state's population. Pursuant to 13 U.S.C. § 141(c), each state is entitled also to a report of its population broken down by municipalities and other geographical areas, for use in legislative apportionment and districting.

38. States and municipalities use the data reported to them pursuant to 13 U.S.C. § 141(c) to draw Congressional districts and to apportion state and municipal legislative districts in accordance with the "one man, one vote" requirements of the Constitution.

39. Finally, census data are used for distributing funds for housing, education, transportation, environmental protection, and other services among states and municipalities.

FACTS

The Inevitability of an Undercount in 1990

40. In every decennial census since at least 1940, there has been an undercount of the population of the United States. The national undercount has been reduced progressively over this period, but the undercount of the following groups has remained consistently and substantially higher than the national undercount: Blacks, Hispanics, other racial and ethnic minorities, documented and undocumented aliens, homeless persons, persons who do not read and speak English well, and persons living in poverty or in high-crime areas. These groups are referred to collectively as the "chronically undercounted."

41. The best-documented of the chronically undercounted are Blacks. In 1987, the Director of the Census Bureau stated that, in the last four censuses, there has been a "persistent difference" of five to six percent between the undercount of Blacks and the undercount of all others. The Director also said that the undercount of

Hispanics has been comparable to the undercount of Blacks.

42. The chronically undercounted constitute a substantially higher percentage of the population of urban areas, including the plaintiff municipalities, than they do of the population of the respective states in which the municipalities are located. The chronically undercounted also constitute a substantially higher percentage of the population of those states than they do of the population of the nation as a whole. As a result, the undercount of the urban areas has been substantially higher than the undercount of the states in which the areas are located, and the undercount of those states has been substantially higher than the undercount of the nation as a whole.

43. The chronically undercounted constitute a substantially higher percentage of the population of the Congressional and state legislative districts in which the individual plaintiffs reside than they do of the population of the respective states in which the districts are located. The chronically undercounted also constitute a substantially higher percentage of the population of those states than they do of the population of the nation as a whole. As a result, the undercount of the individual plaintiffs' districts has been substantially higher than the undercount of the states in which the districts are located, and the undercount of those states has been substantially higher than the undercount of the nation as a whole.

44. Unless the relief requested below is granted, the undercount of the urban areas and districts described in paragraphs 42 and 43 will, in the 1990 decennial census, be substantially higher than the undercount of the states in which they are located, and the undercount of those states will be substantially higher than the undercount of the nation as a whole.

The Use of Statistical Correction

45. Over the last two decades, statisticians have developed and refined certain techniques to correct the census for undercount. The principal technique is "dual-system estimation." This technique involves the taking of an independent second count of a sample of geographic areas. The persons identified in the second count are matched with the persons identified in the first—the census—to produce a third and better estimate of the population of those areas. Then, extrapolating from the sample, the Bureau estimates the population of the nation as a whole, as well as of other geographic areas and racial and ethnic groups. The independent second count is conducted shortly after the census enumeration and is referred to as a "post-enumeration survey."

46. After the 1980 census, the Census Bureau formed an Undercount Research Staff to conduct research on dual-system estimation. In the years that followed, the Staff conducted important work in this area, eliminating or substantially reducing each of the problems that had previously been associated with correction. The work was reviewed and praised by a number of distinguished groups, including a panel of the National Academy of Sciences. The work was also tested in a number of rehearsals of the 1990 census conducted by the Census Bureau.

47. On July 24, 1986, with the prior authorization of the Commerce Department, the Census Bureau announced publicly that it would follow a specific procedure in deciding whether to correct the 1990 census: In early 1987, it would determine whether correction was feasible. If it determined that it was, it would then prepare to correct in 1990. Central to its preparations would be the implementation of a post-enumeration survey of 300,000 households. Using the survey results, the Bureau would produce corrected census figures and, if those figures met certain pre-established standards of reliability, they would become the official decennial census data. The determina-

tion whether the figures met the standards of reliability would be made by the Bureau, after the survey was taken in 1990.

48. In the spring of 1987, the Director of the Bureau determined that correction was feasible and that the Bureau should prepare to correct the 1990 census. On July 14, 1987, he announced publicly that his agency was committing itself to taking the 300,000-household post-enumeration survey.

49. On or before August 7, 1987, however, the Commerce Department secretly reversed the Director's decision. Without conducting any research of its own, the Department prohibited the Director from correcting the 1990 decennial census and conducting the planned 300,000-household survey. The Department directed him instead to conduct a smaller survey, to be used only for the purpose of evaluating the census, not for correcting it.

50. The Department's directives were made with the knowledge that they would result in a disproportionate undercount of Blacks, Hispanics, and other chronically undercounted groups, and of the states and localities in which a disproportionate number of these groups reside.

51. The Department's directives were not based on legitimate technical or operational considerations.

52. The Department's directives were inconsistent with its delegation of authority to the Director with respect to the decennial census, and constituted an unwarranted intrusion upon the Director's traditional authority.

53. On October 30, 1987, at least three months after the Commerce Department had made its decision not to correct in 1990, it announced that decision to the public.

54. It is feasible to correct the 1990 census, and correction will substantially improve the accuracy of the census.

55. Unless the Bureau's discontinued correction program is restored immediately, it may well be impossible to correct the 1990 census.

The Injury to the Plaintiffs

56. Unless the relief requested below is granted, the plaintiff states and municipalities and the individual plaintiffs will suffer loss of political representation.

57. Unless the relief requested below is granted, the plaintiff states and municipalities and the individual plaintiffs will be deprived of funds distributed under federal programs on the basis of census population figures.

58. Unless the relief requested below is granted, the plaintiff states and municipalities will be deprived of the use of accurate population figures in planning their governmental operations.

59. Unless the relief requested below is granted, the members of the plaintiff organizations will suffer loss of political representation and federal funds. Among the purposes of each of the organizations is the prevention of such losses.

60. The plaintiffs have no adequate remedy at law.

FIRST CLAIM FOR RELIEF

61. Unless the relief requested below is granted, the defendants will not take the most accurate census practicable, in violation of Article I, Section 2 of the Constitution, as amended by Section 2 of the Fourteenth Amendment.

SECOND CLAIM FOR RELIEF

62. Unless the relief requested below is granted, the defendants will take a census that discriminates with respect to fundamental rights against individuals residing in legislative districts that are disproportionately undercounted, in violation of the equal protection guarantee of the Fifth Amendment to the Constitution.

THIRD CLAIM FOR RELIEF

63. Unless the relief requested below is granted, the defendants will not take the most accurate census practicable, in violation of 2 U.S.C. § 2a and 13 U.S.C. § 141.

FOURTH CLAIM FOR RELIEF

64. The action of the defendants is arbitrary and capricious, contrary to law, and an abuse of discretion, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs seek judgment:

(1) Requiring the defendants to conduct a full-scale post-enumeration survey in connection with the 1990 decennial census, and to take any other steps necessary to correct that census for undercounts or overcounts in population, using the most accurate correction methods available;

(2) Requiring the defendants to correct the 1990 decennial census for undercounts or overcounts in population, using the most accurate correction methods available;

(3) Requiring the defendants to use the corrected population figures for all purposes for which the defendants use decennial census data; and

(4) Granting such other relief as the Court deems just and proper.

Dated: New York, New York
December 14, 1988

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[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

ANSWER

Defendants,[1] through their undersigned counsel, hereby answer plaintiffs' amended complaint as follows:

FIRST AFFIRMATIVE DEFENSE

Plaintiffs lack standing to maintain this action.

SECOND AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

THIRD AFFIRMATIVE DEFENSE

The amended complaint fails to state a claim upon which relief may be granted.

FOURTH AFFIRMATIVE DEFENSE

The matters alleged in the amended complaint have been committed by law to agency discretion and are not reviewable by the Court.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to state any basis for preliminary injunctive relief.

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[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Robert A. Mosbacher is substituted for defendant C. William Verity, and George W. Bush is substituted for defendant Ronald W. Reagan.

SIXTH AFFIRMATIVE DEFENSE

In response to the numbered paragraphs of the amended complaint, defendants admit, deny, or otherwise aver as follows:

1. This paragraph consists of plaintiffs' characterization of the action, which does not require an answer, but insofar as an answer may be required, deny.

2. Deny, except to admit that the results of the decennial census are used to determine the apportionment of representatives in Congress and state legislatures, the allocation of Electoral College votes in presidential elections, and the distribution of some federal funds.

3. Deny, except to admit that defendants will conduct the 21st decennial census in 1990.

4. Deny, except to admit that the Census Bureau undertook research and planning on statistical techniques to determine whether adjustment of the 1990 census for population undercounts was technically and operationally feasible.

5. Deny, except to admit that the Commerce Department oversees the Census Bureau and determined that a statistical adjustment of the 1990 census was neither technically nor operationally feasible.

6. This paragraph consists of plaintiffs' characterization of the action and not averments of fact to which an answer is required, but insofar as an answer may be required, deny.

7. This paragraph contains no averments of fact but conclusions of law to which no answer is required, but insofar as an answer is required, deny.

8. Admit.

9. Admit.

10. Admit.

11. Admit.

12. Admit.

13. Admit.

14. Defendants are without knowledge or information sufficient to form a belief as to the specific averments of this paragraph, except to admit that the plaintiff named, the U.S. Conference of Mayors, is an organization of mayors.

15. Defendants are without knowledge or information sufficient to form a belief as to the specific averments of this paragraph, except to admit that the plaintiff named, the National League of Cities, is an organization representing cities and state municipal leagues.

16. Defendants are without knowledge or information sufficient to form a belief as to the specific averments of this paragraph, except to admit that the plaintiff named, the League of United Latin American Citizens, is a Hispanic membership organization.

17. Defendants are without knowledge or information sufficeint to form a belief as to the specific averments of this paragraph except to admit that the plaintiff named, the National Association for the Advancement of Colored People, is a national civil rights organization.

18. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

19. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

20. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

21. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

22. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

23. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

24. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

25. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

26. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

27. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

28. Admit.

29. Deny the first sentence. Admit the rest of the paragraph. The Court is referred to 13 U.S.C. §§ 1, *et seq.* and Department Organization Order 35-2A for a full and complete statement of their contents. The Bureau of the Census is subject to the policy direction and general supervision of the Under Secretary for Economic Affairs of the Department of Commerce. D.O.O. 10-9, Section 4.03. The Court is referred to D.O.O. 10-9 for a full and complete statement of its contents.

30. Deny the first sentence. Admit the second sentence. The Court is referred to D.O.O. 35-2A for a full and complete statement of its contents. The Bureau of the Census is subject to the policy direction and general supervision of the Under Secretary for Economic Affairs of the Department of Commerce. D.O.O. 10-9, Section 4.03. The Court is referred to D.O.O. 10-9 for a full and complete statement of its contents.

31. Admit.

32. Deny the first sentence. Admit the second sentence, except to further answer that his actions in planning for and taking the census are subject to the policy direction and general supervision of the Under Secretary for Economic Affairs. D.O.O. 10-9, Section 4.03. The Court is referred to D.O.O. 35-2A and D.O.O. 10-9 for a full and complete statement of their contents.

33. Deny the first sentence. Admit the second sentence. The Court is referred to 2 U.S.C. § 2a for a full and complete statement of its contents.

34. Admit.

35. Admit the first sentence. Deny the second sentence, except to admit that Article I, Section 2 of the Constitution requires the United States government to conduct a census every ten years. Admit the third sentence, except to deny that the requirements of the Constitution are implemented by D.O.O. 35-2A. The Court is referred to D.O.O. 35-2A for a full and complete statement of its contents.

36. Admit.

37. Admit the first sentence. Admit the second sentence, except to deny that each state is "entitled" to a report of its population broken down by municipalities and other geographical areas for use in legislative apportionment and districting. The Court is referred to 13 U.S.C. § 141 (b) and (c) for a full and complete statement of their contents.

38. Admit.

39. Admit.

40. Admit the first sentence. Admit that the national undercount has been reduced progressively over the past 40 years, but deny the rest of the second sentence except as it pertains to blacks at the national level.

41. Deny the first sentence, except to admit that data exists to support the contention that at the national level blacks have been undercounted in previous censuses. Admit the rest of the paragraph.

42. Deny.

43. Deny.

44. Deny.

45. Deny, except to admit that statisticians have developed the "dual-system estimation" technique, which involves the taking of an independent second survey of the population in geographic areas, which is referred to as a "post-enumeration survey."

46. Admit the first sentence. Deny the second sentence, except to admit that the Undercount Research Staff (URS) conducted important research on dual-system estimation (DSE). Admit the third sentence. Deny the fourth sentence, except to admit that elements of the URS research on DSE have been tested in census tests and in the one census dress rehearsal which tested the use of DSE to evaluate census results.

47. Admit.

48. Deny the first sentence. Admit the second sentence.

49. Deny.

50. Deny.

51. Deny.

52. Deny.

53. Deny, except to admit that on October 30, 1987, the Commerce Department announced a decision which Secretary C. William Verity had reached on October 26, 1987 that the 1990 census would not be statistically adjusted.

54. Deny.

55. Deny.

56. Deny.

57. Deny.

58. Deny.

59. Deny.

60. This paragraph states a legal conclusion which does not require an answer, but insofar as an answer may be required, deny.

61. Deny.

62. Deny.

63. Deny.

64. Deny.

Each and every allegation of the amended complaint not heretofore expressly admitted or denied is hereby denied.

Defendants deny that plaintiffs are entitled to the relief for which they pray or to any relief whatsoever.

WHEREFORE, defendants, having fully answered, respectfully request that this action be dismissed with prejudice and that this Court award the defendants costs against plaintiffs and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

STIPULATION AND ORDER

WHEREAS the Secretary of Commerce is vested by law with supervisory authority over the Bureau of the Census and the conduct of the Decennial Census and does not by anything said herein intend to relinquish any authority or decisionmaking power thereby duly vested in him, including without limitation the decision whether or not to adjust the 1990 Decennial Census; and

WHEREAS the Secretary of Commerce intends that the 1990 Decennial Census shall be conducted in conformity with all applicable statutory and constitutional requirements including without limitation 13 U.S.C. § 141(b), (c) and in a manner designed to achieve the most accurate population counts practicable; and

WHEREAS the parties hereto at this time believe that the Census, including a post-enumeration survey and other adjustment-related operations, can and will be conducted in a manner that will result in the most accurate counts practicable, and no party has any basis at this time to believe that the Census, including the PES and adjustment-related operations, cannot and will not be conducted in such a manner; and

WHEREAS the parties wish to avoid the burdens, costs and delays of unnecessary litigation.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, that:

1. All pending motions, including plaintiffs' pending Motion for a Preliminary Injunction, are withdrawn.

2. Defendants agree and represent that, notwithstanding the decision by the Department of Commerce (the "Department") announced on October 30, 1987, that there would be no statistical adjustment or correction for undercount or overcount in the 1990 Decennial Census, and without conceding that that decision was incorrect, the decision is vacated, and the question of whether or not to carry out a statistical adjustment of the 1990 Decennial Census ("adjustment") shall be made by a thorough *de novo* reconsideration undertaken with an open mind, without any prejudgment, and consistent with the procedures set forth herein.

3. Defendants agree and undertake to conduct a post-enumeration survey ("PES") of not fewer than 150,000 households, a number defendants believe is sufficient for the purpose, and such other procedures or tests as they deem appropriate, as part of the 1990 Decennial Census in a manner calculated to ensure the possibility of using the PES, not solely for evaluation purposes, but to produce corrected counts usable for congressional and legislative reapportionment, redistricting and all other purposes for which the Bureau of the Census (the "Bureau") publishes data.

4. Defendants agree that the Department will promptly develop and adopt guidelines articulating what defendants believe are the relevant technical and non-technical statistical and policy grounds for decision on whether to adjust the 1990 Decennial Census population counts. The Department's proposed guidelines shall be published in the Federal Register by December 10, 1989, with a request for comments. The guidelines shall be published in final form in the Federal Register by March 10, 1990.

5. Defendants shall determine whether an adjustment satisfies the guidelines specified in para. 4 hereof. If the

Secretary determines to make an adjustment, defendants shall publish corrected 1990 Decennial Census population data at the earliest practicable date and, in all events, not later than July 15, 1991. If the Secretary determines not to make an adjustment, defendants shall publish at the earliest practicable date and, in all events, not later than July 15, 1991, a detailed statement of its grounds, including a detailed statement of which guidelines identified in para. 4 above were not met and in what respects such guidelines were not met.

6. Defendants intend to report census counts in accordance with the dates set forth in 13 U.S.C. §§ 141(b), (c). In the event that the Department releases or publishes any population counts from the 1990 Decennial Census prior to its determination with respect to adjustment in accordance with para. 5 hereof, defendants agree that each such release or publication shall bear the following legend conspicuously on the first page:

> "The population counts set forth herein are subject to possible correction for undercount or overcount. The United States Department of Commerce is considering whether to correct these counts and will publish corrected counts, if any, not later than July 15, 1991."

7. Defendants shall establish as soon as practicable and, in all events, not later than September 30, 1989, an independent Special Advisory Panel (the "Panel") to advise the defendants on all matters relevant to the implementation of this Stipulation and, in particular, and without limitation, the guidelines identified in para. 4 above, the application and achievement of the guidelines, the expedition with which defendants are proceeding toward decision on adjustment, and plans and schedules for the implementation of the Census and the PES in a manner that will result in the most accurate final census data at the earliest practicable time. The Panel shall be comprised of eight persons, none of whom shall be em-

ployed by any of the parties hereto, of such knowledge, judgment, and probity that their judgment and advice shall be entitled to the utmost respect by defendants. All eight persons shall be appointed by the Secretary of Commerce. The Panel shall have two co-chairs from among their number appointed by the Secretary. Each member of the Panel shall submit his or her recommendations to the Secretary.

8. The members of the Panel shall be entitled to call for and shall receive the fullest cooperation from defendants, including access to all necessary or appropriate information and the opportunity to consult with any employee of the Bureau. Defendants shall take all steps necessary to give each member of the Panel reasonable access to all relevant records and information, including administering appropriate oaths of secrecy pursuant to 13 U.S.C. § 9. The Panel or any member thereof may make such disclosures, consistent with all applicable statutory requirements, as it or he deems appropriate. The Panel may adopt such rules for its governance as it deems appropriate.

9. The Department shall pay the members of the Panel a stipend of $284.80 per day for each day on which the Panel meets and such member is present and shall reimburse the members of the Panel for their reasonable and necessary expenses of travel and lodging in connection with the work of the Panel. The Department shall furnish the Panel with appropriate meeting and office facilities and clerical assistance. The Panel is entitled to retain appropriate assistants who shall be entitled to access to all materials made available to the Panel. Defendants shall make available to the Panel a fund of $500,000 against which each co-chair may draw, consistent with existing laws, rules, and regulations governing the expenditure of appropriated funds, for appropriate resources to ensure that Panel members can perform their mission.

10. The Panel shall dissolve on agreement of the parties that all of its functions pursuant to this Stipulation have been satisfied.

11. Except as expressly set forth herein, the parties reserve all their respective rights, claims, and defenses. Specifically, and not by way of limitation, plaintiffs reserve the right to challenge any of the guidelines, decisions, or procedures adopted, omitted, implemented, or announced in connection with or arising out of this Stipulation.

Dated: July 17, 1989

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SO ORDERED:

/s/ Joseph M. McLaughlin
U.S.D.J.

APPENDIX SEVEN

CENSUS BUREAU DIRECTOR RECOMMENDATION

RECOMMENDATION TO SECRETARY OF COMMERCE ROBERT A. MOSBACHER ON WHETHER OR NOT TO ADJUST THE 1990 CENSUS

Barbara Everitt Bryant

Director, Bureau of the Census
Department of Commerce

June 28, 1991

* * * * *

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RECOMMENDATION TO SECRETARY OF COMMERCE ROBERT A. MOSBACHER ON WHETHER OR NOT TO ADJUST THE 1990 CENSUS

Barbara Everitt Bryant
Director, Bureau of the Census
Department of Commerce

June 28, 1991

This section of the report is organized in three sections:

Recommendation
Background
Discussion of Guidelines

RECOMMENDATION

There now exist one enumeration and two estimates of the *resident* population of the United States on April 1, 1990.

248,709,873 Resident population as enumerated in the 1990 census (an additional 922,000 overseas military, Federal employees and their dependents were added to the resident population to make up the apportionment population of 249,632,692 delivered to President George Bush December 26, 1990).

253,393,786 Estimate of resident population from Demographic Analysis (DA)

253,979,141 Estimate of resident population from Post-Enumeration Survey (PES) using Selected PES Model. This is the "adjusted" resident count.

The latter two estimates were made using the most extensive post-census research ever conducted by the Bureau of the Census.

Recommendation: As Director of the Bureau of the Census, I, Barbara Everitt Bryant, recommend to Secretary of Commerce, Robert A. Mosbacher, that results of the 1990 Post-Enumeration Survey be used to statistically adjust the 1990 census.

I make this recommendation for these reasons:

1. I believe that statistical adjustment, while far from a perfect procedure, will on average increase the accuracy of the 1990 census.

2. A majority of the Undercount Steering Committee, comprised of nine senior, career, statistical and demographic experts in the Bureau of the Census, believe statistical adjustment leads to an improvement in the counts as enumerated. I have sat through the months of deliberations of this Committee as an *ex-officio* member. Most particularly, I sat in on extensive deliberations from mid-April to mid-June 1991. The Committee evaluated the Post-Enumeration Survey and use of the model for adjustment that was pre-specified in April 1990. I have listened to research teams and consultants supervised by members of this Committee present results of 19 studies to evaluate the quality of the Post-Enumeration Survey and 11 studies of Demographic Analysis, the alternative method used to estimate the population.

3. The 1990 census counted approximately 98 percent of the population of the United States. Compared to all other survey-type efforts, whether done by government agencies, academic survey research centers, or private sector survey

organizations, counting 98 percent of a diversified population in a democratic country with no mandatory individual or household registration is an extraordinary feat. However, there remains about 2 percent of the population *who cannot be reached by enumeration efforts*, for reasons of being disconnected from the society, not understanding the census, apathy, or purposefully avoiding being counted. According to the Post-Enumeration Survey, approximately 5.3 million persons were uncounted in the 1990 census of whom 1.5 million were Blacks and 3.8 million Non-Blacks (a substantial number of the Non-Blacks were Hispanics). The size of the population that cannot be enumerated has grown over the past decade.

4. The Bureau of the Census has measured census undercount since 1940. This undercount is differentially higher for Blacks than Non-Blacks, for males than females. It is time to correct this historical problem. Extra ordinary efforts were made in 1990 to reduce the differential undercount. The differential was not reduced. There is no currently identifiable methodology to attain 100 percent population coverage via enumeration in 2000. With the increasing diversity of the country, a growing diversity documented by the 1990 census, the problem could be larger in 2000. Thus correcting for the small percent who cannot be reached should be addresed now.

5. The decennial census is the benchmark. It is the basis for drawing samples for all other household surveys during the decade, surveys that provide the Federal Government with many of the economic and social indicators used for program

planning and evaluation. It is the base from which estimates of the population are made between censuses. It is important for national social and economic statistics that this benchmark count be made as accurate as possible.

6. The quality of the 1990 Post-Enumeration Survey is excellent. Thus—for the first time in history—a tool exists with which to correct the census enumeration to make it more accurate. Two independent types of research provide estimates that the resident population of the United States is 253-254 million, not 248.7 million, as enumerated.

There is no perfect truth as to the size and distribution of the population. Adjusting may bring the numbers closer to the truth, but precise truth cannot be measured. Adjustment, while improving counts for a majority of states and communities, may not improve the count for every community; it may even reduce accuracy for some. There are places where the count, as enumerated, is closer to the truth.

Adjustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree. The minority viewpoint expresed in the Census Bureau's report, which follows my report, illustrates this.

I stand, however, with the majority of the Census Bureau's Undercount Steering Committee in judging that adjustment would improve the 1990 census.

BACKGROUND

The Bureau of the Census used two types of research to evaluate the completeness of the 1990 census. These are described more fully in Appendices 3-5, but are summarized here.

Demographic Analysis:

Postcensus research to estimate the adequacy of census enumeration (coverage) of the population is not new. Demographic Analysis—using birth, death, immigration and other noncensus administrative records goes back to 1940. Historically, post-census research has been conducted for evaluation purposes to assist in planning the next census rather than for adjusting the most recent one.

Census Bureau demographers have improved and refined Demograpsic Analysis through the years, using new analyses of historical data and findings from each census to improve estimates. Thus, it has been possible to make retrospective corrections to Demographic Analysis estimates that were published after each census. According to Demographic Analysis, the census counted 98.2 percent of U.S. residents in 1990, while 1.8 percent were not counted. Based on the most current research, undercounts for the past six censuses are as shown in Table A.

Table A

Historical Estimates of the Amount and Percent of Net Undercount as Measured by Demographic Analysis, by Race: 1940 to 1990

	Demographic Analysis Estimates of Net Undercount [1] (Amount in thousands)											
	1990		1980		1970		1960		1950		1940	
	Amount	%	Amount	%	Amount	%	Amount	%	Amount	%	Amount	%
Total Population	4,684	1.8	2,802	1.2	5,653	2.7	5,700	3.1	6,537	4.1	7,513	5.4
Black	1,836	5.7	1,257	4.5	1,566	6.5	1,327	6.6	1,225	7.5	1,187	8.4
Non-Black	2,848	1.3	1,545	0.8	4,087	2.2	4,374	2.7	5,312	3.8	6,326	5.0
Difference	NA	4.4	NA	3.7	NA	4.3	NA	3.9	NA	3.8	NA	3.4

[1] Estimates represent "point" estimates of net undercount for each census and are subject to uncertainty regarding the accuracy of the estimates. The estimates for 1940-1980 are based in part on the "reverse projection" of the population aged 65 and over in 1990 using estimates of population change, which adds another component of error in those coverage estimates. The estimates represent revisions of previously published coverage estimates for 1940-1980.

As you can see, the estimated undercount in the census dropped over successive censuses from 5.4 percent in 1940 to 1.2 percent in 1980[1]. In 1990, undercount rose slightly to 1.8 percent. Throughout the period of the six censuses, however, the undercount differential between the Black and Non-Black population has remained in the 3.4-4.4 percent range. For 1990, Demographic Analysis shows a differential of 4.4 percent.

For the 1990 census, the Census Bureau mounted the most extensive effort ever to enumerate Blacks and other minorities. This included the hiring of 280 community outreach workers who worked in communities two years before census taking; involvement of 56,000 community organizations—mostly minority but also city and state Complete Count Committees; outstanding cooperation from Black and Spanish language media in running public service announcements and programs about the importance of the census; and the hiring of follow-up enumerators from minority populations, bilingual and multilanguage enumerators, and residents of public housing projects and American Indian reservations to enumerate persons in their neighborhoods. Despite this effort, the undercount differential was not reduced below its historical level.

Post-Enumeration Survey:

Demographic Analysis can provide estimates only at the national level and only for males and females, Blacks and Non-Blacks by age groups. A second type of research, a Post-Enumeration Survey, can provide detail

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[1] The undercount estimate according to Demographic Analysis published after the 1980 census in *The Coverage of Population in the 1980 Census* by Robert E. Fay, Jeffrey S. Passel, and J. Gregory Robinson (U.S. Department of Commerce, Bureau of the Census, February 1988, Table 3.2) showed 1.4 percent undercount. 1.2 percent is the revision made as part of the improvements in Demographic Analysis developed for evaluation of the 1990 census.

by demographic groups and for areas below the national level. A Post-Enumeration Survey, not Demographic Analysis, can be used as the basis for adjustment. After the 1980 census, the Bureau of the Census conducted a post-census survey for the first time. The quality of this survey was not adequate for use for adjustment purposes, and the analyses of it occurred long after the census. In the decade since, the Census Bureau has researched improvements in the methodology of post-enumeration surveys. The 1990 Post-Enumeration Survey proves to be a high quality survey of 167,000 households with matching of the individuals in these households to the 1990 census to identify those who were counted or missed.

According to the 1990 Post-Enumeration Survey, the census counted 97.9 percent of U.S. residents, but did not count 2.1 percent. As Table B shows, the 1990 undercount for Blacks is 4.8 percent; 5.2 percent for Hispanics; 5.0 percent for American Indians; 3.1 percent for Asian and Pacific Islanders, and 1.7 percent for Non-Blacks. Differences in the Black and Non-Black count between the Demographic Analysis and the Post-Enumeration Survey are not statistically significant.

Table B.

Selected Post-Enumeration Survey (PES) Estimates of Total Resident Population: United States Total

Race/ Hispanic/ Sex Group	Resident Census Enumeration	Selected PES Estimate of Population	Estimated Under/ Over-count Rate	Margin of Error due to Sampling
Total	248,709,873	253,979,141	2.1	0.4
Male	121,239,418	124,249,093	2.4	0.4
Female	127,470,455	129,730,048	1.7	0.4
Black	29,986,060	31,505,838	4.8	0.6
Male	14,170,151	14,974,382	5.4	0.6
Female	15,815,909	16,531,456	4.3	0.6
Non-Black	218,723,813	222,473,303	1.7	0.4
Male	107,069,267	109,274,711	2.0	0.4
Female	111,654,546	113,198,592	1.4	0.4
Other Populations of Interest				
Asian or Pacific Islanders	7,273,662	7,504,906	3.1	0.9
Male	3,558,038	3,688,436	3.5	1.0
Female	3,715,624	3,816,470	2.6	0.9
American Indian	1,878,285	1,976,890	5.0	2.1
Male	926,056	980,874	5.6	2.2
Female	952,229	996,016	4.4	2.0
Hispanic [2]	22,354,059	23,590,274	5.2	0.8
Male	11,388,059	12,086,513	5.8	0.9
Female	10,966,000	11,503,761	4.7	0.9

[2] Persons of Hispanic Origin may be any race.

Demographic Analysis and Post-Enumeration Survey results are similar, but not identical. The Demographic Analysis, although not usable for adjustment, does serve to confirm the results of the Post-Enumeration Survey with some exceptions. Exceptions are that Demographic Analysis shows less undercount among females and more undercount among Black males than does Demographic Analysis. Demographic Analysis and the Post-Enumeration surveys differ on the undercount within several age groups. Overall, however, both Demographic Analysis and the Post-Enumeration Survey, show a total population undercount of approximately 2 percent. Both show differentials between the counts of Blacks and Non-Blacks, males and females, with Blacks (Black children age 0-9 and Black males age 20-64) and males in total having the higher undercounts. Additionally, the Post-Enumeration Survey shows an undercount differential for Hispanics and American Indians comparable to that for Blacks. It shows a somewhat smaller undercount for Asians and Pacific Islanders, though still larger than that for Non-Blacks.

Because political representation and many Federal, State, and local funds are apportioned on the basis of census counts, the missing 2 percent are important to the communities and states in which those who do not cooperate or those who actively avoid the census live. You have heard from many mayors, governors, and legislators who stress how vital a full count is to them, and we at the Census Bureau have heard from them as well.

We have also heard the views of elected officials from states and communities where there was a full count. They say their residents cooperated; their states and communities provided human and monetary resources to get their residents counted accurately. They feel that places with undercounts had the opportunity to do the same and should not benefit from an adjustment at the expense of places where residents were cooperative.

While listening to both points of view, I base my recommendation to adjust the 1990 census on concern for accuracy of the count—both numerically and proportionally.

DISCUSSION OF GUIDELINES

Guideline 1: The Census shall be considered the most accurate count of the population of the United States, at the national, state, and local level, unless an adjusted count is shown to be more accurate. The criteria for accuracy shall follow accepted statistical practice and shall require the highest level of professional judgment from the Bureau of the Census. No statistical or inferential procedure may be used as a substitute for the Census. Such procedures may only be used as supplements to the Census.

To determine whether the census count or the adjusted count is the most accurate, the Census Bureau made its best estimate of the "true" resident population of the United States and compared the census and adjusted counts to that.

The procedure used to produce the adjusted counts was to classify individuals into one of 1,392 classifications, called post-strata. Every individual in the United States fits into one, and only one, of these post-strata. These post-strata are based on census division (such as New England or Pacific), type of place of residence (such as large or small city, suburban, nonmetro), tenure (owner or renter housing), race, Hispanic ethnicity, sex, and age. The Post-Enumeration Survey (PES), plus matching of PES households to census questionnaires, measured the proportion of each post-strata classification who were counted in the census, in the PES, counted in both, or in one but not the other. The Census Bureau used an estimating method called the Dual System Estimate (DSE) and a "smoothing method" (discussed later in this report) to estimate the population. The estimate included an

estimate for those who were missed by both the census and the PES. The DSE made this estimate nationally and for each of the 1,392 post-strata of persons. This gave the adjusted counts.

To estimate the "true" population required making many evaluations to identify bias, sampling error and other errors introduced in the survey process in the PES and the resultant DSE. These errors and biases were combined in a Total Error Model that was used to correct the Dual System Estimates for post-strata aggregated into 13 larger strata, each with similarities in characteristics. This modified population estimate was then used as the best approximation of the "true population" against which to compare both the adjusted counts and the census. This process just described is a statistical procedure called Loss Function Analysis.

Loss Function Analysis statistically describes the consequences of using a particular set of data with its aggregate loss due to error in the distribution of the population. The focus of the analysis is on *distribution* rather than magnitude of the estimates of the population. It is an appropriate tool to use to evaluate the census because most Federal uses of census data are for porportional distributions.

Loss Function Analysis shows that there would be an accuracy gain in proportion of population for 29 states offset by possible inaccuracy in 21. Inaccuracy can be in the direction of moving an area to a proportional overcount, as well as undercount, so inaccuracy is not necessarily harmful to the area. The states where accuracy would be improved contain two-thirds (67 percent) of the nation's population enumerated in the census.

Adjustment would improve the proportional accuracy of the counts for approximately 54 percent of cities and places with populations of 100,000 or more and 72 percent of counties with 100,000 or more. Demographers

reviewed adjusted counts for these places and compared them to other data—1980 counts, intercensal estimates and demographic characteristics—to see whether these adjusted counts have "face validity," that is, do they make sense? The vast majority do, but there are some exceptions. Adjustment will improve the accuracy of the 1990 population for the majority, but not for all places.

In addition to Loss Function Analysis computed by statisticians, demographers made an independent evaluation of the adjusted population counts for states. To do this they compared the adjusted state counts with counts simulated by Demographic Analysis. To make the simulations (because Demographic Analysis is only at the national level), they disaggregated census counts for each state by race and Hispanic ethnicity. They then applied DA national undercount rates to Black and Non-Black subpopulations and PES rates to Hispanic and Asian and Pacific Islanders. Then they built up new state estimates by recombining the racial and ethnic groups. These simulated state estimates further confirmed the "face validity," or reasonableness, of the adjusted state counts.

The Census Bureau examined proportional distribution for places of under 100,000. There is little direct evidence to judge whether adjusted counts are more accurate for places under 100,000. However, Loss Function Analysis shows that for metropolitan places of less than 25,000, 25,000-49,999 and 50,000 or more, and for non-metropolitan plans less than 25,000, and 25,000-49,999 in total, by these size categories, adjusted counts are more accurate than the census. However, there are concerns about the accuracy of the loss function assumptions for small areas.

The Census Bureau's nine member Undercount Steering Committee majority judges that the improvement in counts on the average for the Nation, States, and places over 100,000 population outweighs the risk that the ac-

curacy of adjusted counts might be less for smaller areas. The minority on that Committee have concerns about whether the Total Error Model is accurately measuring all sources of error.

Loss Function Analysis, based on the method of estimating the "true" population used, shows that adjustment is better than the census for apportionment. It is more likely that the corrected apportionment based on an adjusted count would be closer to the truth than further from the truth.

The Census Bureau subjected the PES and resultant DSEs to test after test to find fatal flaws in procedures. The Census Bureau did not find fatal flaws.

Evaluations show that the PES is of sufficiently high quality to use as an adjustment tool. In the professional judgment of the Census Bureau's Undercount Research Committee, this survey and the Selected PES model for adjustment improve the count over the census.

The adjusted count would improve accuracy by correcting major differentials in coverage by race and ethnicity compared to the census. Existence of these differentials is supported by Demographic Analysis and historical data. Using the adjusted numbers would not totally close the gap in the undercount of Black children aged 0-9 and Black men aged 20-64, but it would be an improvement over the census. Since minority undercounts impact on many local areas, adjusted counts would clearly improve the count for places with major minority populations. Offsetting these gains, Demographic Analysis suggests that adjustment may over correct for females. Taking into account 24 age-sex-groups, the similarity between the Post-Enumeration Survey and Demographic Analysis (though there are some differences) suggests that the PES is reflecting real undercounts in the census that adjustment would substantially, though not completely, correct.

The PES, supported by Demographic Analysis, estimates that the resident population of the United States on April 1, 1990 was approximately 5.3 million greater than was counted in the census. The fact that both these Census Bureau research projects, including the one based on administrative records rather than census data, produce nearly the same 5 million number is strong evidence that these residents of the United States exist. Logic also supports the existence of people who cannot or will not be counted, although logic cannot confirm their numbers. In my opinion, not adjusting would be denying that these 5 million persons exist. That denial would be a greater inaccuracy than any inaccuracies that adjustment may introduce.

Guideline 2. The 1990 Census may be adjusted if the adjusted counts are consistent and complete across all jurisdictional levels: national, state, local and census block. The resulting counts must be of sufficient quality and level of detail to be *usable* for Congressional reapportionment and legislative redistricting, and for all other purposes and at all levels for which census counts are published.

The adjustment model as designed allows adjustment to be carried out across all jurisdictional levels. As described earlier, each individual is classified into one of 1,392 post-strata. The PES and matching to census questionnaires plus use of the DSE measure the under/overcount of each post-stratum so that an adjustment factor can be calculated for each. Each individual is then weighted by the adjustment factor for his or her post-stratum to create the adjusted populations at all levels. This is called synthetic adjustment. The model carries out adjustment consistently and completely across all jurisdictional levels.

Because of the problems of correcting a census with a survey, an adjusted count cannot be accurate in each

of the 4 million occupied blocks, or at all larger aggregations of them. There is no PES system—short of one which took a second perfect census—that could say adjusted counts are more accurate for all blocks.

Relevant to whether counts can be carried to all levels is the question of whether the assumption approximately holds that the probability of being counted in the census is the same for all persons in the same post-strata classification. When people are combined by age and sex, these 1,392 post-strata are subdivisions of 116 larger post-strata. To test whether the people living on blocks within these 116 larger post-strata are homogeneous, that is, alike, on factors related to being counted or not, the Census Bureau conducted an analysis of the homogeneity of 115 of the 116 larger post-strata (the 116th is persons living on Indian reservations). This was done using a regression prediction model to predict an adjustment factor for block parts, then comparing that with the factor of 1.0 (no adjustment) representing the census counts. This predicted adjustment factor was also compared with the measured factor for the post-strata to be used for adjusted counts. For 24 of the 115 post-strata the census count was superior while for 91 post-strata the adjusted count was superior. This gave support to the accuracy of the Selected PES adjustment model for carrying adjustment out at the block level within post-strata.

Two studies examined the validity of using post-strata based on census division, rather than states, for estimation. The synthetic adjustment uses post-strata based on census divisions. The two studies gave different reults. One study showed that in 8 of the 9 regions there were no significant differences among states within post-strata. The other showed significant state effects within post-strata. The Census Bureau put more weight on the first study.

Professional judgment of the majority of the Census Bureau's Undercount Steering Committee is that the prob-

ability of having been counted or not in the census is sufficiently homogeneous among block parts within post-strata to support adjustment. The minority on the Committee are concerned about the prediction model and the difference by states. I stand with the majority in use of the Selected PES adjustment model.

Guideline 3: The 1990 census may be adjusted if the estimates generated from the pre-specified procedures that will lead to an adjustment decision are shown to be more accurate than the census enumeration. In particular, these estimates must be shown to be robust to variations in reasonable alternatives to the production figures, and to variations in the statistical models used to generate adjusted procedures.

Pre-specification: Procedures for postcensus research and the model for adjustment were pre-specified in April 1990. Census Bureau statisticians set specifications well before field work for the PES and long before there were any census data. Thus there was no possibility of the model being designed to attain a desired outcome.

The Census Bureau report, which follows this one, documents on pages 9-10 that procedures were carried out according to pre-specification with one exception. A method needed to be developed to treat some unusually large variances in the operation called "smoothing." These large variances had not been anticipated. Census Bureau statisticians discussed the method they selected to handle these with the Special Advisory Panel, who also agreed these large variances should be handled separately.

Accuracy: The section on Guideline 1 states reasons why I believe that adjusted numbers are more accurate than the census.

Robustness: "Robustness" refers to the strength of a statistical model, that is, will reasonable variations produce the same results? Census Bureau statisticians examined robustness of components of the adjustment pro-

cedures at several levels, as described on pages 10-12 of their report. They simulated alternatives to the model used for imputation of missing data from the PES. There were very little missing data in this survey. The Dual System Estimates of population showed little differences between the model used and the simulated alternative ones.

The robustness of the adjustment model to variations in post-strata by alternatives of census division or state were tested to see if either stratification treatment produced different estimates of state populations. This was done following production of preliminary PES adjustment factors, which showed states within census divisions had similar undercounts. Only 3 states showed differences in population estimates when the post-stratification was done by states rather than the pre-specified census divisions. However, this analysis was limited because the PES was not designed to support direct state estimates. Some of the work discussed for Guideline 2 indicated that, in general, the post-stratification was robust.

Comparing alternative adjustment models which did not use census divisions for stratification, the Undercount Steering Committee felt that alternative methods, though differing, were still more accurate than the census. In effect, any bias in making state estimates by division would be offset by other gains.

As I discussed earlier, the Census Bureau used a "smoothing" procedure to reduce the effect of sampling errors on the adjustment factors. The smoothing model did prove to be sensitive, that is, not robust, to variations in handling of the small number of unusually large variances. There is also concern that different sets of predictor variables could product a different set of adjustment factors. Thus, the weakness of the pre-specified PES adjustment model is in its sensitivity to changes in the smoothing procedure. (See pages 11-12 of the Census Bureau

report). In that report the Undercount Steering Committee says, "The Committee is concerned about the lack of robustness in the strictest sense and potential problems in the smoothing process. On balance, the majority finds there is no evidence to conclude that concerns about the smoothing model would affect their overall assessment about the accuracy of the adjusted numbers . . . The minority cannot conclude that lack of robustness in the smoothing model is a small enough problem not to affect the accuracy of adjusted numbers."

For a final test, statisticians compared the Selected PES adjustment model that used the smoothed variances with two other models that based post-strata on different variables (for example, owner/renter). These two models produced DSEs closer to those in the Selected PES model than to the census.

Guideline 4. The decision whether or not to adjust the 1990 Census should take into account the effects such a decision might have on future census efforts.

Accurate measurement of actions individuals might take 9 years in the future is not possible. We did try to get some "feeling" for the impact a 1991 decision to adjust or not adjust the 1990 census might have on the next census. This was done by contracting with National Opinion Research Center (NORC) for a short telephone survey to recontact persons in a representative national sample of 2,478 households interviewed last year, shortly after the census, for a study of census participation. Both NORC and I agreed that measuring a "what if" situation cannot predict participation in the year 2000 census. What can be measured is a sense of how people feel *now* about what their participation might be.

NORC was able to complete interviews with persons in 1,612 (or 65 percent) of the households between May 3 and June 3, 1991. Those dates were after release of

preliminary PES adjustment figures (on April 18) and before release of the final ones (on June 13).

What the study shows is that the controversy over whether to adjust or not erodes individual intentions to participate, but that intentions to participate would be little different whether the census were to be adjusted or not.[8]

First of all, the survey shows that the adjustment issue is not high in public consciousness or well understood. Only one-quarter (23.4 percent) of persons said they had seen or heard anything about the census in the past few months. When probed about what they had seen or heard, only 14.1 percent spontaneously mentioned anything to do with adjustment, undercount or errors in the census count. This overall 14.1 percent level ranged from 7.6 percent of those with less than a high school graduate education to 22.9 percent of those who are college graduates. When told that people are talking about whether or not to adjust the results of the census to correct for errors in counting the population, 22.3 percent then recalled they had seen or heard something about this. Probing questions showed that only 4.9 percent understand the adjustment issue.

Thus for many, the survey itself became the educational tool about the adjustment issue. Table C shows measures of likelihood of participating in the next census. The Initial Measure was the first question in the survey, before any mention of adjustment. There were two Final Measures, one asking about likelihood of participating if the 1990 census were not adjusted and one about likelihood if it were adjusted. While all measures show high intentions of participating in the next census (higher than the proportion who returned mail questionnaires in 1990), there is a drop between the Initial Measure and both Final

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[8] National Opinion Research Corporation, *The Potential Impact of Adjusting or Not Adjusting the 1990 Census*, June 19, 1991.

Measures. Between the two measures, there was explanation of the issue of adjustment, several measures of potential participation under different scenarios for census-taking, and then the Final Measure.

The big dropoff between Initial and Final Measures is among those in the top category. Approximately 40 percent of those who initially said they were "extremely likely to participate" shifted to "very" or "somewhat." About 35 percent of the "very likelys" split to shift both up to "extremely" and down to "somewhat likely to participate."

Table C.

Participation in the Next Census

INITIAL MEASURE: How likely is it that your household will participate in the next census? That is, when you receive the next census questionnaire in the mail, how likely is it that a member of your household will fill it out and mail it back?	FINAL MEASURE OF LIKELIHOOD OF PARTICIPATING IN NEXT CENSUS: What if the decision is made to NOT ADJUST/ADJUST the 1990 census figures this year? How likely would your household be to participate in the next census?	
Initial	Final/Not Adjust	Final/ Adjust
Extremely likely	48.5	31.9	33.4
Very likely	35.8	39.4	42.1
TOTAL EXTREMELY AND VERY	84.3	71.3	75.5
Somewhat likely	9.2	18.4	17.2
Not very likely	5.5	8.6	5.3
Don't know/refused	1.0	1.7	2.0
	100%	100%	100%

Source: NORC, June 10, 1991.

Based on all the data in the survey, my summary is that if the next census were being taken today, the damage to

participation comes from the controversy surrounding adjustment rather than what the decision is. Intention to participate is marginally higher if the census is adjusted than if it is not. Three-quarters (75.5 percent) are "extremely or very likely to participate" if the census is adjusted compared to 71.3 percent if it is not. This difference is greater than could be caused by sampling error.[4] However, NORC points out in its conclusions: "While large numbers remain very favorably disposed to participating in the next and future censuses, this intention is a very slippery, ephemeral and changeable one . . . subject to influence by factors like the adjustment decision or, more likely, from the controversy or fallout emanating from the events that follow that decision."

Guideline 5. Any adjustment of the 1990 census may not violate the United States Constitution or Federal statutes.

As I have no legal training, I cannot make a professional judgment on this Guideline.

Guideline 6. There will be a determination whether to adjust the 1990 Census when sufficient data are available, and when analysis of the data is complete enough to make such a determination. If sufficient data and analysis of the data are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust the 1990 census.

I feel sufficient data now exist to make the decision. The Census Bureau has completed all of the pre-specified evaluation studies of both Demographic Analysis and Post-Enumeration Survey results. The Census Bureau has run adjusted numbers using the PES data three ways: raw data, an initial modification, and finally choosing the Selected PES model as the best adjustment model—given

[4] 95 percent confidence level.

pre-specification in April 1990—that could be evaluated and used to produce adjusted counts by July 15, 1991.

I share with researchers at the Census Bureau the wish that there were more time to evaluate these studies and adjustment models in greater depth. However, it is always the case with research that each exploration suggests future work.

Over the coming years, perhaps even within the current year, Census Bureau statisticians are likely to develop an adjustment model, using the 1990 PES data, which improves on the Selected PES model. However, such a model is more likely to modify than to radically change the population adjustments of the Selected PES model.

New computer tapes with adjusted counts at all jurisdictional levels (PL 94-171 tapes used for redistricting) for 50 states and the District of Columbia will be available July 15.

Guideline 7. The decision whether or not to adjust the 1990 Census shall take into account the potential disruption of the process of the orderly transfer of political representation likely to be caused by either course of action.

The question of whether or not to adjust the 1990 census count has already caused some disruption. Some states have moved ahead with redistricting while others are waiting for the adjustment decision. Redistricting is always a difficult, and often controversial process. If the decision is made to adjust, clearly existing plans will require revision, most particularly in the states for which the number of seats in the House of Representatives changes.

The best case scenario is that the decision either to adjust or not adjust affects only redrawing of plans or moving ahead with redistricting. Redistricting is now a computerized process. New and alternative plans can be

produced quickly. It is the political negotiations, not the production of redistricting plans, that cause delays.

The worst case scenario would be any court or Congressional action which prevented timely reapportionment and redistricting.

There are suits in court both pro and anti-adjustment, although the suit that has precipitated the July 15, 1991 deadline for decision was brought by plaintiffs with a pro-adjustment position. There will be controversy in Congress whatever the decision. Therefore, I do not think that the decision to adjust is potentially more disruptive than the decision not to adjust.

Guideline 8. The ability to articulate clearly the basis and implications of the decision whether or not to adjust shall be a factor in the decision. The *general rationale* for the decision will be clearly stated. The technical documentation lying behind the adjustment decision shall be in keeping with professional standards of the statistical community.

The task is to articulate the use of either:

A count with a measured undercount

or

A count with a statistical adjustment to correct undercount

While explaining the first may be somewhat easier to do in layman's terms than explaining the second, either requires the Secretary of Commerce, the Department of Commerce, the Economics and Statistics Administration and the Bureau of the Census to defend the position taken.

I view articulation of the basis of the decision to adjust or the decision not to adjust as equally challenging. Therefore, this Guideline does not weigh in my recom-

mendation. There will need to be both a layman's and a statistical explanation of either choice.

The Census Bureau has maintained technical documentation of all research and procedures.

I close by repeating what I said at the beginning: I recommend statistical adjustment to improve the accuracy of the 1990 census.

APPENDIX TEN

PRESS RELEASES FROM APRIL 18, 1991 AND JUNE 13, 1991

[Materials Lodged with the Clerk of the Court]

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Case No. 88-CV-3474

THE CITY OF NEW YORK, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

STIPULATION OF FACTS PROPOSED BY DEFENDANT-INTERVENOR STATE OF WISCONSIN

Plaintiffs, plaintiff-intervenors, defendants and defendant-intervenors, by their undersigned counsel, stipulate to the admission of the following facts proposed by defendant-intervenor State of Wisconsin in the trial of this matter:

1. During the 1990 decennial census, the State of Wisconsin undertook measures to inform Wisconsin residents of the importance of completing and returning their census forms.

2. Wisconsin's efforts included $225,000 of state funds being allocated for a statewide public awareness campaign

and a $525,000 matching grant program, also funded by the state, aimed at reaching groups traditionally undercounted in the decennial census.

3. The statewide public awareness campaign was launched with a kick-off event at which Governor Tommy G. Thompson declared March 1990 "Census Awareness Month" in Wisconsin. The campaign, coordinated through the Demographic Services Center in the Wisconsin Department of Administration (DOA), included printed pamphlets, posters, buttons, bumper stickers and stickers displaying the slogan "Wisconsin's Counting on You!" These materials, along with promotional information produced by the U.S. Bureau of the Census, were distributed through state agencies, local governments, libraries, schools, businesses, county extension offices, and other statewide networks.

4. State staff also produced a public service announcement for radio and television, worked with state media to encourage coverage of census issues, gave census presentations to groups around the state, and served as a clearinghouse for census information and materials. In addition, the state sponsored census poster and essay contests for middle and high school students and worked with the Wisconsin Department of Public Instruction and schools statewide to incorporate census lessons into school curricula. The state's matching grant program drew participation from twenty municipalities and associations. These included the cities of Ashland, Beloit, Eau Claire, Green Bay, Janesville, Kenosha, La Crosse, Madison, Milwaukee, Monona, New Berlin, Racine, Stevens Point, Wausau, and West Allis; the counties of Marathon, Milwaukee, Monroe, and Wood; and the Wisconsin Towns Association.

5. To qualify for a matching grant, applicants were required to meet specific population criteria and to develop local campaigns aimed at populations traditionally undercounted in the census. Undercounted groups included: racial and ethnic minorities, persons with limited English-

speaking ability, migrant workers, the homeless, residents of public housing and other concentrations of rental units, students, and individuals who may be outside the mainstream of daily life, such as the elderly or homebound.

6. Local public awareness campaigns covered a wide range of activities involving local businesses, community organizations, government agencies, media, schools, volunteer groups, and others. In some cases, locally produced materials and public service announcements were targeted to specific populations and published in several languages. Posters, billboards, and transit signs were developed in some areas and many communities established census assistance centers to assist resident in completing census forms. Participation in public awareness activities was not limited to those receiving state funds, however, as many associations, business and civic organizations, schools, and community groups statewide included census information in their newsletters, mailings, and presentations.

7. In addition to their involvement in public awareness activities, local governments helped improve the accuracy of the census through participation in several additional programs organized by the Wisconsin State Data Center (DOA-Demographic Services and the University of Wisconsin-Applied Population Laboratory). These programs allocated an additional $30,000 to the state's efforts.

8. Prior to the 1990 headcount, local Wisconsin governments worked with the Census Bureau to confirm and update local boundaries on census maps in an on-going census program known as the Boundary and Annexation Survey (BAS). The last survey occurred in the early part of 1990 when local-government officials were asked to draw their January 1990 boundaries on census maps. These boundaries formed the basis for 1990 census collection and tabulation procedures.

9. Local Wisconsin officials also assisted the Census Bureau by checking the number and location of housing

units in their municipalities through the Census Bureau's Local Review Program. In the Local Review Program, officials were asked to compare census housing unit counts with their own local housing unit estimates and to report inaccuracies to the Census Bureau. Local governments were also asked to report boundary discrepancies found on census maps.

10. During the Pre-Census phase of the Local Review Program in the fall of 1989, local officials compared their housing unit counts to preliminary housing unit counts sent to them by the Census Bureau. The Bureau spent the early part of 1990 reviewing problems and discrepancies reported by local governments and making necessary adjustments before the actual census in April 1990.

11. During the post-census phase of Local Review in the summer of 1990, local Wisconsin officials received the 1990 Census housing unit counts for their areas, along with corresponding maps, and were again asked to compare these with local sources of information and to report problems to the Census Bureau. In early fall of 1990, Census District Offices conducted field and office checks to remedy discrepancies reported by local governments, improving the accuracy of the 1990 Census results.

12. Local Wisconsin officials began preparing for participation in the Local Review Program in 1987 when the Wisconsin State Data Center conducted Local Review training sessions throughout the state. These sessions were repeated in the fall of 1989 and again in the summer of 1990. Over twenty-four training sessions were held and hundreds of local of officials attended.

13. Wisconsin led the rest of the United States in the percentage of residents who voluntarily completed and returned their census questionnaires during the 1990 decennial census. By April 23, 1990, Wisconsin had a 76.2% response rate, compared to approximately 65% nationally.

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IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

AFFIDAVIT OF GEORGE HUMPHREYS

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

George G. Humphreys, of lawful age and being first duly sworn upon oath, states:

1. I am Research Director, Oklahoma House of Representatives, a position I have held since 1985. I worked with the Oklahoma legislative leadership to preplan and carry out the adoption of appropriate legislation to accomplish reapportionment and redistricting following the 1990 census. I was responsible for selecting and training research staff, proposing a budget, making recommendations for acquiring computer hardware and software necessary to accomplish the redistricting, assisting in bill drafting, and in general preparing for and implementing changes in political districts that would result from the 1990 census.

2. For two years before becoming Research Director, I was the Information Service Director for the Oklahoma Department of Economic and Community Affairs, supervising the State Data Center. In that capacity I worked closely with Data Center staff in coordinating pre-census planning for Oklahoma with Census Bureau officials and in applying census data to use in Oklahoma.

3. Article V, Section 11A of the Oklahoma Constitution requires the state legislature to redistrict during the first regular session following a decennial census and to complete redistricting within ninety legislative days. The legislative redistricting requires the determination of boundaries for approximately 100 (101 in the 1991 plan) house districts and forty-eight senate districts. In addition, the boundaries of the federal congressional districts certified by the Clerk of the U.S. House of Representatives to Oklahoma following the decennial census must be determined.

4. In anticipation of redistricting after the 1990 census, I began hiring research staff for the House of Representatives in 1989. Eventually, four full-time staff persons and a computer consultant were hired to assist the leadership of the House on redistricting. A similar number of staff were involved on the Senate side. In addition to staff hired and consultants contracted for the effort, my supervisor, one of our staff attorneys, and I devoted considerable time to the project. Due to a lack of space in the State Capitol, the House of Representatives had to lease office space outside the Capitol and develop costly telecommunications linkages between that office and the legislative host computer where the data resided. In 1989, the State of Oklahoma contracted for the computer hardware and software to process the census data for congressional reapportionment and state redistricting. The software was tested for several months to insure accurate data processing.

5. Between October, 1989 and January, 1990, we participated in the Census Bureau's Phase 2 project to draw county precinct lines on Census Bureau maps. Boundary descriptions for thousands of voting tabulation districts (i.e., precincts) obtained from election boards in the seventy-seven counties in Oklahoma were entered into the state data base. Census Bureau Phase 2 maps were prepared, checked, corrected, and forwarded to the Census Bureau so that population counts could be re-

ported for the state by precinct. The legislature used the precincts as the basis for its reapportionment and redistricting plans.

6. Reapportionment committee chairmen in both the House of Representatives and Senate were selected during the 1989 legislative session and the committees were appointed in 1990. The committees adopted rules (e.g., tolerances in data, acceptable variance in size of legislative districts) and established timetables for consideration and passage of reapportionment and redistricting legislation. Committees in both houses conducted a dozen public hearings across Oklahoma in late 1990 and early 1991 in which public input regarding the redistricting process was sought.

7. Census data became available to Oklahoma on February 13, 1991. My staff and I worked closely with the Reapportionment Committee and leadership of the House of Representatives to draw up House district boundaries so that no House district varied in population from any other district by more than three percent. During approximately three months from February through May, 1991, our office produced hundreds of maps for review and consideration. Several thousand man-hours of time were spent by legislators, legislative leaders, and staff in processing census data to develop reapportionment and redistricting plans acceptable to both the Legislature and the Governor.

8. Congressional reapportionment was achieved with remarkable accuracy: Five Congressional districts in Oklahoma have identical populations, the sixth district has one more person than the other five.

9. The Oklahoma legislature completed the reapportionment and redistricting as required by the Oklahoma Constitution. Congressional reapportionment was enacted through S.B. 301 (Okla. Sess. Laws Ch. 260, §§ 1-8) on May 27, 1991. H.B. 1001 for redistricting the House of Representatives (Okla. Sess. Laws Ch. 189, §§ 1-9)

and S.B. 300 for redistricting the Senate (Okla. Sess. Laws Ch. 193, §§ 1-8) were signed into law by the Governor on May 15, 1991. A few errors in H.B. 1001 were corrected in S.B. 302, signed by the Governor on June 4, 1991 (Okla. Sess. Laws Ch. 311, §§ 1-10).

10. The Oklahoma legislature adjourned, as it was required to do by the Oklahoma Constitution, on May 31, 1991.

11. After the end of the legislative session, my staff and the Senate staff worked with officials in the seventy-seven counties in Oklahoma to redraw district boundaries for the three County Commissioners in each county. Under H.B. 1111 (Okla. Sess. Laws Ch. 185, §§ 1-2), each county had to be redistricted by the October 1 following publication of census data into three commissioner districts having populations as equal as practical. Commissioner districts were required to follow clearly visible, definable boundaries based on criteria established by the Census Bureau for recognizing census geography. We also prepared legal descriptions for the new state house districts and worked with the Department of Transportation in producing county maps that were used by county election boards in all seventy-seven counties. That task took approximately four months and the new precincts were used in the March 10, 1992 vote in Oklahoma's presidential preferential primary.

12. Oklahoma expended well over $1 million in accomplishing redistricting during 1991.

13. The Oklahoma legislature convened its 2nd Regular Session of the 43rd Legislature on February 3, 1992. It is scheduled to adjourn no later than May 29, 1992.

14. Candidates for all seats in the U.S. House of Representatives, Oklahoma House of Representatives, and half of the state Senate seats will file their declarations of candidacy pursuant to the 1991 district plans July 6-8, 1992. Primary elections for all contested seats in the U.S. House of Representatives, Oklahoma House of Representatives, and half the seats in the Oklahoma

Senate, based on the new district plans, as well as numerous offices at the county level, will be held on August 25, 1992. Run-off elections as needed will be conducted on September 15, 1992, and the general election will be on November 3, 1992. By law, the persons who will be sworn in as members of the Oklahoma Legislature and the Oklahoma delegation to the new Congress will have been elected pursuant to the 1991 redistricting and reapportionment plans.

15. If an adjustment is made statistically in the census data which have already been used to draw political boundaries in Oklahoma, it will not be possible to revise those boundaries again before candidates file for office and the elections are conducted. Once it adjourns at the end of May, 1992, the Oklahoma legislature will not convene again in regular session until February 1, 1993, when the 1st Regular Session of the 44th Legislature will begin.

16. It is not clear under the Oklahoma Constitution who would be responsible for reapportionment and redistricting if an adjustment to the census data were now made statistically. Oklahoma Constitution, Article V, § 11A provides that if "the Legislature shall fail or refuse to make such apportionment" within the first legislative session after the census is taken, the reapportionment would be accomplished by a commission composed of the Attorney General, the Superintendent of Public Instruction, and the State Treasurer. Neither Section 11A nor related sections specifies any timetable for the Apportionment Commission to file its order of apportionment. The Oklahoma Constitution did not contemplate adjustments to census data after their submission by the Department of Commerce to the President. In Section 3 of H.B. 1001, by which redistricting of the Oklahoma House of Representatives was accomplished, the legislature declared its intent in light of possible adjustment:

> SECTION 3. For purposes of compliance with Section 11A of Article 5 of the Oklahoma Constitution requiring apportionment within ninety (90) legislative days after the convening of the First Regular Session of the Legislature following each Federal Decennial Census, the Legislature declares, pursuant to this act, that the Legislature has accomplished the apportionment of the State House of Representatives within the required time following the submission by the United States Department of Commerce to the President of the 1990 decennial census population counts on December 26, 1990. Such counts, however, were transmitted with a caveat that the counts were subject to possible corrections for undercount or overcount by the United States Department of Commerce. Therefore, it is the intent of the Oklahoma Legislature that should an adjustment of the population counts for Oklahoma occur, the Oklahoma Legislature reserves the right to revise, if necessary, the apportionment of the State House of Representatives provided by this act to ensure substantive equality of population among the districts.

However, there is no precedent of which I am aware by which we can know for certain whether the legislative apportionment accomplished in 1991 would satisfy the constitutional requirements of Article V, § 11A, despite the legislative declaration of intent. In my opinion, statistical adjustment of the census data would in all probability result in litigation in Oklahoma regarding who has authority to redo the reapportionment using adjusted data or whether the officials elected pursuant to the 1991 plans were elected pursuant to valid plans. A statistical adjustment would, in all probability, subject the Oklahoma congressional apportionment plan to litigation. The adjustment would create inequalities in district populations that would make the 1991 plan subject to a court challenge

if an alternative plan could be presented to a court with lower population variations.

/s/ George G. Humphreys
GEORGE G. HUMPHREYS

[Notary Omitted in Printing]

SUPREME COURT OF THE UNITED STATES

No. 94-1614

WISCONSIN, PETITIONER

v.

CITY OF NEW YORK, ET AL.

ORDER ALLOWING CERTIORARI

Filed September 27, 1995

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. This case is consolidated with 94-1631, *Oklahoma v. City of New York, et al.* and 94-1985, *Department of Commerce, et al. v. City of New York, et al.* and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply.

September 27, 1995

SUPREME COURT OF THE UNITED STATES

No. 94-1631

OKLAHOMA, PETITIONER

v.

CITY OF NEW YORK, ET AL.

ORDER ALLOWING CERTIORARI

Filed September 27, 1995

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. This case is consolidated with 94-1614, *Wisconsin v. City of New York, et al.* and 94-1985, *Department of Commerce, et al. v. City of New York, et al.* and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply.

September 27, 1995

SUPREME COURT OF THE UNITED STATES

No. 94-1985

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ORDER ALLOWING CERTIORARI

Filed September 27, 1995

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. This case is consolidated with 94-1614, *Wisconsin v. City of New York, et al.* and 94-1631, *Oklahoma v. City of New York, et al.* and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply.

September 27, 1995

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FILED
NOV 8 1995
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Nos. 94-1614, 94-1631, 94-1985

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

[Caption Continued on Inside Cover]

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PETITIONER STATE OF WISCONSIN

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BEST AVAILABLE COPY

STATE OF OKLAHOMA, *Petitioner*,

v.

CITY OF NEW YORK, et al., *Respondents*.

UNITED STATES DEPARTMENT OF COMMERCE, et al., *Petitioners*,

v.

CITY OF NEW YORK, et al., *Respondents*.

QUESTION PRESENTED

Whether the July 15, 1991, decision of the Secretary of Commerce not to substitute statistically adjusted census numbers for the 1990 decennial census totals previously reported by the President for the reapportionment of Congress and transmitted to the states for use in redistricting was consistent with the language of the Constitution and the constitutional goal of equal representation.

LIST OF PARTIES

The parties to the proceeding in the court of appeals were the City of New York; State of New York; City of Los Angeles; City of Chicago; Dade County, Florida; United States Conference of Mayors; National League of Cities; League of United Latin American Citizens; National Association for the Advancement of Colored People; Marcella Maxwell; Donald H. Elliott; John Mack; Olga Morales; Timothy W. Wright, III; Raymond G. Romero; Antonio Gonzales; Athalie Range; City of Atlanta, Georgia; Maynard Jackson, individually and as the Mayor of the City of Atlanta; Florida House of Representatives; Florida State Conference; Miguel A. De Grandy; Willye Dennis; Mario Diaz-Balart; Dr. Charles Evans; Rodolfo Garcia, Jr.; Bollowy L. "Bo" Johnson; Alfred J. Lawson, Jr.; Willis Logan, Jr.; Johnnie McMillan; Alzo J. Reddick; Peter Rudy Wallace; T.K. Wetherell; State of Texas; City of Phoenix, Arizona; State of New Jersey; State of Florida; City of Cleveland, Ohio; City of Denver, Colorado; City of Inglewood, California; City of New Orleans, Louisiana; City of Oakland, California; City of Pasadena, California; City of Philadelphia, Pennsylvania; City of San Antonio, Texas; City of San Francisco, California; Broward County, Florida; State of Arizona; City of Baltimore, Maryland; City of Boston, Massachusetts; City of Long Beach, California; City of San Jose, California; Los Angeles County, California; San Bernardino County, California; District of Columbia; Navajo Nation; State of New Mexico; City of Tucson, Arizona, and Council of Great City Schools; the United States Department of Commerce; Ronald H. Brown, Esq., as Secretary of the United States Department of Commerce; Michael R. Darby, as Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; Barbara Everitt Bryant, as Director of Bureau of Census; William J. Clinton, as President of the United States; Donnald K. Anderson, as Clerk of the United States House of Representatives; Michael Espy, as Secretary of Agriculture; Donna E.

Shalala, as Secretary of Health & Human Services; Henry Cisneros, as Secretary of Housing & Urban Development; Robert B. Reich, as Secretary of Labor; Federico Pena, as Secretary of Transportation; Richard W. Riley, as Secretary of Education; State of Wisconsin and State of Oklahoma.

The People of the State of California *ex rel.* Daniel E. Lungren, Attorney General, and County of Hudson, New Jersey, were parties to the proceedings in the district court, whose judgment was vacated by the court of appeals, but were not parties to the proceeding in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-40)[1] is reported at 34 F.3d 1114 (2d Cir. 1994). The opinions of the district court (Pet. App. 41-95, 96-120, 121-34) are reported at 822 F. Supp. 906, 739 F. Supp. 761 and 713 F. Supp. 48. The decision of the Secretary of Commerce (Pet.-App. 135-415) is published at 56 Fed. Reg. 33582.

JURISDICTION

The judgment of the court of appeals was entered August 8, 1994. The State of Wisconsin petitioned for rehearing on August 22, 1994, which was denied on January 4, 1995 (Pet. App. 416-18).[2] Wisconsin filed a petition for writ of certiorari in No. 94-1614 on April 3, 1995. Oklahoma filed a petition for writ of certiorari in No. 94-1631 on April 4, 1995. On March 27, 1995, Justice Ginsburg extended the time for the Government's filing of a petition for writ certiorari to and including May 4, 1995. On April 25, 1995, Justice Ginsburg further extended the time within which to file to and including June 3, 1995. On June 3, 1995, the Solicitor General filed a petition for writ of certiorari in No. 94-1985. The petitions were granted on September 27, 1995, and the cases were consolidated (J.A. 109-111). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are U.S. Const. art. I, § 2, cl. 3, *amended by* U.S. Const.

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[1]References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 94-1614.

[2] The State of Oklahoma's petition for rehearing was denied on December 12, 1994 (Pet. App. 419-21).

amend. XIV, § 2; U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; and U.S. Const. amend. XV, § 1. Statutes involved are 2 U.S.C. § 2a, 13 U.S.C. § 141 and 13 U.S.C. § 195. The pertinent text of these provisions is set forth at Pet. App. 422-27.

STATEMENT OF THE CASE

This case concerns claims that the United States Constitution mandates the use of specific methodological innovations in taking the decennial census.

In October 1987, the Department of Commerce announced its decision that it would not attempt to statistically adjust the results of the 1990 census, as it had also decided with respect to the 1980 census. Litigation regarding the 1980 census ended in December, 1987, with the decision in *Cuomo v. Baldrige*, 674 F. Supp. 1089 (S.D.N.Y. 1987), upholding the census. In November, 1988, New York City, Los Angeles, Chicago, Dade County, Florida and the states of New York and California, joined by several interest groups and individuals, filed suit to compel the Department of Commerce and the Census Bureau to undertake statistical estimation procedures designed to "correct" anticipated errors in the 1990 decennial census, this time venuing the action in the Eastern District of New York (R. 1).[3] Plaintiffs' complaint alleged that the census as planned would result in an undercount of the population, that the undercount would be differentially concentrated among racial and ethnic minorities and that, as a result, states and cities with large

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[3]New Jersey, Florida, Texas, New Mexico, Arizona and the District of Columbia subsequently joined the suit as plaintiffs-intervenors (R. 130, 145, 161, 206, 207, 223). Following the July 15, 1991, decision of then-Secretary of Commerce Robert Mosbacher not to adjust the results of the 1990 census, Wisconsin and Oklahoma intervened as defendants (R. 213, 276). Two related district court actions, *City of Atlanta v. Mosbacher*, No. 92-CV-1566 (N.D. Ga.), and *Florida House of Representatives v. Franklin*, No. 92-CV-2037 (N.D. Fla.), were later consolidated with the New York proceedings (R. 323. 332).

minority populations would be undercounted relative to other states and regions, causing a loss in representation and in census-based allocations of federal monies (J.A. 44-45, 48). Plaintiffs alleged that post-census statistical estimation techniques provided a feasible method for correcting the anticipated undercount (*id.* at 46-47). The failure to employ this specific census procedure was alleged to violate U.S. Const. art. I, § 2, by failing to conduct "the most accurate census practicable," and to discriminate "with respect to fundamental rights against individuals residing in legislative districts that are disproportionately undercounted," in violation of Fifth Amendment equal protection guarantees (J.A. 48). Plaintiffs did not contend that the differential undercount resulted from a discriminatory purpose or that, given the Census Bureau's decision to adhere to an "actual enumeration," the Bureau would not attempt "to arrive at as accurate a figure as humanly possible" (Pet. App. 99). Statutory claims were asserted under 2 U.S.C. § 2a, 13 U.S.C. § 141 and the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (J.A. 48-49). Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1337, 1361, 2201, 2202 and 5 U.S.C § 702 (J.A. 40).

A. Stipulation to Conduct Post-Enumeration Survey.

Following the district court's denial of the Government's motion to dismiss and motion for summary judgment (Pet. App. 121-34), the parties entered a stipulation, approved by the court on July 17, 1989, under which the Secretary of Commerce agreed to reconsider *de novo* whether to carry out a statistical adjustment of the 1990 census (J.A. 61-67). The stipulation required that the decision be made by July 15, 1991, and in accordance with published guidelines articulating the relevant technical and

nontechnical statistical and policy grounds for the decision (*id.* 62-63).[4]

The Census Bureau went forward as planned with the vast statistical undertaking of attempting to count every person living in the United States as of April 1, 1990, resulting in a resident population count of the United States of 248,709,873 and an apportionment count of 249,632,692 (Pet. App. 320). The enumeration process began with the development of comprehensive maps of each block in the United States, the identification of housing units on each block and included pre- and post-census review by state and local governments. The actual enumeration started with the basic mail-out/mail-back procedure, followed by multiple contacts with each household that did not return a census questionnaire, a 100% recheck of vacant or uninhabitable units, a "Were you counted?" advertising campaign, a parolee and probationer check, and a housing coverage check (*see generally id.* at 319-32). Aware of differential census coverage rates for minority populations in earlier censuses, the Census Bureau mounted the most extensive effort ever to enumerate African-Americans and other minorities.[5] State and local governments were free to

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[4]The district court subsequently upheld the guidelines established by the Commerce Department against the plaintiffs' challenge that they violated the stipulation and were biased against adjustment (Pet. App. 110-18). In the same decision, the court granted plaintiffs' declaratory judgment that statistical adjustment would not violate either the Constitution's requirement of an "actual enumeration," U.S. Const. art I, § 2, cl. 3, or 13 U.S.C. § 195 (Pet. App. 107-110). Section 195 of Title 13 of the U.S. Code directs the use of sampling, where feasible, in carrying out the Department's census functions, "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several states . . . ."

[5]As described by Census Director Bryant in her recommendation to Secretary Mosbacher (J.A.76):

encourage census participation. For example, both Wisconsin and Detroit mounted census awareness and outreach campaigns.[6] As subsequently measured by the PES, the 1990 census counted 98.4% of the total population.[7]

Despite this accomplishment, problems remained. The return rate of questionnaires during the initial mail out/mail back phase was only 63% (*id.* at 15, 327-28), although in Wisconsin it exceeded 76%, representing the highest voluntary response rate in the country (J.A. 98; *see also* A.R. App. 6 at 40). Moreover, despite the efforts to enumerate minority residents, the undercount differential was not reduced below historic levels (J.A. 76).

Pursuant to the July 1989 stipulation, the Census Bureau began conducting a Post-Enumeration Survey, or PES, nearly three months after the April 1 census date (Pet. App. 336). The PES procedure consisted of stratifying the population into 1,392 mutually exclusive poststrata defined by geography, race/ethnic group, housing tenure, age and sex (*id.* at 52 n.5, 164). Data obtained from a

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This included the hiring of 280 community outreach workers who worked in communities two years before census taking; involvement of 56,000 community organizations--most minority but also city and state Complete Count Committees; outstanding cooperation from Black and Spanish language media in running public service announcements and programs about the importance of the census; and the hiring of follow-up enumerators from minority populations, bilingual and multi-language enumerators, and residents of public housing projects and American Indian reservations to enumerate persons in their neighborhoods.

[6]*See* J.A. 95-101; Administrative Record ("A.R.") App. 6 at 40 (Wisconsin); Pet. App. 174 (Detroit).

[7]The 1.6% undercount estimate reflects a correction of an original 2.1% estimate resulting from the discovery of a computer coding error and the correction of errors in 104 sample block clusters thought to have a major impact on bias in the original estimates (Tr. 1782-83, 1786-92; DX 31 (Tr. 1790-92)); *see also* 58 Fed. Reg. 69, 73 (Jan. 4, 1993).

sample consisting of roughly 377,000 people (*id.* at 157), or approximately one-sixth of one percent of the national population, were matched to data obtained in the census[8] to estimate census coverage rates for each poststratum (*id.* at 76 n.23, 169-70, 336-40). The overwhelming majority of the nation's 39,000 local jurisdictions were unrepresented in the sample (*id.* at 80, 212; A.R. App. 13[9] at 4). The construction of the PES meant that an average sample of roughly 300 people was used to estimate census coverage rates for each demographic post-stratum (A.R. App. 13 at 3), on average containing roughly 180,000 people. The PES did not sample states individually but aggregated them into nine census divisions (Pet. App. 164, 342-43, 370-72). For example, only 141 blocks from Wisconsin, the least populous state in the East North Central census region, were included in the sample (*id.* at 372). The state's undercount estimate was primarily based on data obtained in 947 blocks sampled in Illinois, Indiana, Michigan and Ohio (*id.* at 371-72). California dominated the sample uses to estimate state populations in the Pacific census division, providing nearly half of the division's 1,390 blocks included in the sample (*id.* at 370-72; *see also* A.R. App. 13 at 3-4). The PES relied on the assumption of sample homogeneity--that persons in each poststratum were homogeneous with respect to their probability of being missed by the census (Pet. App. 79, 205).

Based on the sample observations, as well as the imputation of nearly nine million people for whom match status between census and survey could not be determined (*id.* at 75-76, 170), an estimate of the undercount or overcount rate for each poststratum, called an adjustment factor, was derived using the statistical technique of dual system estimation (*id.* at 340-42). The raw adjustment

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[8]Confusingly referred to as the P-sample (population) and E-sample (enumeration) (Pet. App. 76 n.23). Only one sample was taken.

[9]D. Freedman, *Adjusting the 1990 Census*, 252 Science 1233 (1991).

factors exhibited significantly greater variability than had been anticipated during the design of the PES, and a statistical technique known as "smoothing" was used to reduce this variability (*id.* at 57 n.10, 219-27).

"Selected PES" estimates were completed in June 1991 (A.R. App. 10 (June 13, 1991, Release)). As originally calculated, the PES estimated that the 1990 census had resulted in a 2.1% undercount of the national population (Pet. App. 58). Consistent with earlier studies, coverage rates were found to be disproportionately lower for racial and ethnic minorities, estimated to range from 94.8% for Hispanics to 98.8% for non-Hispanic whites (*ibid.*). Coverage rates also varied by state, although the relation between minority and state undercounts was often counter-intuitive.[10] The June 1991 undercount estimates for every state in the New England, Middle Atlantic, East North Central and West North Central census regions were below the national average, meaning that each state in the Midwest and Northeast, including the plaintiffs New York and New Jersey, would lose population as a percentage of the national population under the adjusted numbers (A.R. App. 10, Tables 1, 5 (June 13, 1991, Release)). Had the June 1991 estimates been used as the apportionment census, California and Arizona would have each gained, and Wisconsin and Pennsylvania would have each lost, one seat in the House of Representatives (Pet. App. 17).

B. The Secretary's Adjustment Decision.

On July 15, 1991, then-Commerce Department Secretary Mosbacher announced his decision not to adjust

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[10]For example, Montana, Idaho and Wyoming were each reported to have undercount rates roughly double those estimated for New Jersey, Michigan and Illinois (A.R. App. 10, Table 1). Rhode Island's estimated undercount of 0.3%, the lowest in the country, was one-fourth the undercount for non-Hispanic whites nationally (*ibid.*).

the 1990 census[11] (Pet. App. 135-415). Explaining his decision, Secretary Mosbacher stated that he was deeply troubled by the persistence of a differential undercount of minority populations and expressed regret that adjustment was unable to address this problem without adversely affecting the integrity of the census (*id.* at 138-39). The Secretary acknowledged that a statistical adjustment would likely increase the "numeric accuracy" of the census (*id.* at 184-85, 200). He explained, however, that the constitutional purpose of the census was not simply to count the total number of people in the United States but to locate them so that political representation could be allocated to the states and to their residents in proportion to their numbers. Accordingly, he concluded that the primary criterion for accuracy should be distributive rather than numeric accuracy (*id.* at 200-201). The Secretary found that while the adjusted numbers appeared to come closer to giving the nation's total population than the enumeration census, the census numbers displayed greater distributive accuracy than the adjusted counts and represented the most accurate count of the population of the United States at the state and local levels (*ibid.*).

The Secretary's statistical evaluation of the competing census results (adjusted and unadjusted) was

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[11]A Special Advisory Panel appointed to advise the Secretary on the adjustment decision pursuant to the July 1989 stipulation split evenly in recommending in favor of and against adjustment, with all of the members nominated by the plaintiffs recommending adjustment (Pet. App. 59). Based on the Census Bureau's "loss function" analysis, a majority of the Census Bureau's Undercount Steering Committee supported the adjusted numbers as being the more accurate (*id.* at 59). The late discovery of an error in the calculation of loss function values was subsequently reported to weaken, but not change, the majority's conclusion (*id.* at 190-91, 244-45). While recommending in favor of adjustment, the Director of the Census Bureau also recognized that "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree" (J.A. 73). The Under Secretary for Economic Affairs and the Administrator of the Economics and Statistics Administration recommended against adjustment (Pet. App. 59).

highly technical and comprehensive. The Secretary expressed concern regarding the introduction of errors in the PES in the process of attempting to determine whether people included in the sample had been counted in the census. He noted that for 1.7% of the P-sample and 2.1% of the E-sample, match status could not be resolved and had to be imputed using a logistic regression model. When weighted up to the national population, imputed matches represented nearly nine million people, a number almost twice as large as the estimated net national undercount (*id.* at 75-76, 170).

The Secretary also found troubling the large measured bias in the PES estimates. At the time of the July 1991 adjustment decision, preliminary results of the Census Bureau's total error model indicated that the PES was biased towards overestimating the undercount and that a biased-corrected estimate would be about 1.4% rather than the estimated 2.1%. This meant that roughly a third of the net undercount adjustment came from bias in the PES. Biases in the PES also tended to be higher for minority evaluation strata (*id.* at 180). In addition, the Secretary concluded that uncertainty about the true variance of the adjusted figures meant that even their superior numeric accuracy had not been definitively demonstrated (*id.* at 201). The Secretary found that the loss function analyses and hypothesis tests that had been prepared by the Census Bureau at the time of the adjustment decision supported the superior accuracy of the census counts, when distributive accuracy was considered and when reasonable estimates of the error variance of the alternative DSE were used (*ibid.*). Noting that the results of PES evaluation studies had not been completely analyzed by the time of the decision and that the statistical tools used to calculate and evaluate the adjusted counts were at the cutting edge of statistical research, Secretary Mosbacher expressed deep concern that if an adjustment were made, it would be on the basis of research conclusions that might well be reversed in the next several months (*id.* at 248).

The Secretary also identified substantial evidence which cast doubt on the homogeneity assumption underlying the entire synthetic adjustment methodology (*id.* at 204-13). In addition, the Secretary reported that small changes in adjustment methodology were capable of moving seats in the House of Representatives (*id.* at 228). The single methodological decision to exclude 28 out of 1,392 variance outliers during the process used to "smooth" the raw adjustment factors was alone sufficient to shift a House seat from Pennsylvania to Arizona (*id.* at 220). One member of the Special Advisory Panel had calculated the states' populations using five modifications to the PES's modeling assumptions. Each produced a different apportionment of Congress (*id.* at 218). The Secretary identified "the bundle of statistical techniques contained in the smoothing process" as one of the most problematic aspects of the adjustment process (*id.* at 228), finding that the techniques relied heavily on statistical assumptions, resulted in large changes in adjustment factors and might very well have led to an overstatement of the undercount (*id.* at 219-28).

In addition to concluding that the adjusted numbers did not improve, but more likely worsened, the distributional accuracy of the census, the Secretary identified policy considerations militating against adjustment. The sensitivity of the PES results to modeling assumptions not only impaired their usability but opened the census to the risk of political manipulation (*id.* at 213-28). Statistical estimation also undermined incentives to future census participation, including state and local support for future censuses (*id.* at 228-38). Adjustment also risked significant disruption to the orderly transfer of political representation that would result from changing the census numbers already reported by the President for the apportionment of Congress and used by the states in redistricting (*id.* at 249-56).

C. District Court's Decision Upholding Adjustment Decision.

Following the Secretary's decision, the district court permitted extensive discovery and then set the case for trial. The 13-day trial consisted almost exclusively of expert demographic and statistical testimony and produced thousands of pages of exhibits (Pet. App. 60-61). Evidence was presented that in attempting to correct for bias in the original PES estimates, the Census Bureau discovered errors whose correction reduced the national undercount estimate to 1.6% (Tr. 1786-87, 1790-91; DX 31 (Tr. 1790-92)); *see also* 58 Fed. Reg. 69, 73 (Jan. 4, 1993). Correction of these errors changed state undercount estimates as well, but not uniformly.[12] Less technical evidence regarding Wisconsin's experience in the census and the disruption adjustment would cause to Oklahoma's redistricting process was submitted by stipulation and affidavit (J.A. 95-101, 102-108). On April 13, 1993, the district court issued a decision upholding the Secretary's decision against adjusting the 1990 census (Pet. App. 43-95). The court also ordered the release of block-level adjusted census data to the plaintiff states (*id.* at 91-95).

The district court adhered to its earlier ruling that the Secretary's decision would be reviewed under the APA's arbitrary and capricious standard (*id.* at 63-66; *see also id.* at 129-33). The court agreed with the Secretary's decision to focus on distributive, rather than numeric, accuracy, given the census's function in distributing political representation and economic benefits

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[12]New Mexico's estimated undercount fell by the largest amount, 1.44%. Both Arizona's and California's undercount estimates were reduced by 0.92%, which, in the case of California, would have represented nearly 275,000 people. New Hampshire's undercount increased by 0.22%. New Jersey's estimated undercount fell to 0.57%, more than a percentage less than the revised national undercount. Pennsylvania's undercount estimate was reduced by 0.34%, while Wisconsin's was reduced by 0.06% (DX 31, Attachment 4).

(*id.* at 77-78). The court engaged in a detailed review of the adjustment decision under each of the Department's eight published guidelines (Pet. App. 69-89).[13] While finding the adjustment decision reasonable under each of the guidelines, the court commented, with little explanation, that were it "called upon to decide this issue *de novo*, I would probably have ordered the adjustment" (*id.* at 89). Nevertheless, the court agreed with one of the Census Bureau's principal statisticians that "'reasonable statisticians could differ on this conclusion'" (*id.* at 91), concluding that the Secretary's decision had been neither arbitrary nor capricious (*ibid.*).

D. Court of Appeals' Decision.

All of the plaintiffs except California and Hudson County, New Jersey, appealed the district court's decision, arguing that because the case involved constitutional claims, it should be remanded for *de novo* review. On August 8, 1994, a divided panel of the United States Court of Appeals for the Second Circuit ruled that the judgment of the district court be vacated and the case remanded for further proceedings to determine whether the decision not to adjust was essential to the achievement of a legitimate governmental interest (*id.* at 4, 39-40).

The court first rejected Wisconsin's and Oklahoma's argument that statistical estimation of the apportionment census was barred by the statutory exception to sampling in the apportionment census contained in 13 U.S.C. § 195 (*id.* at 23-25). The court then reviewed the constitutionality of the adjustment decision under equal protection standards made applicable to the federal

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[13]Guideline One "mandate[d] that the actual count be considered the most accurate count of the population 'at the national state and local level, unless an adjusted count is shown to be more accurate'" (Pet. Ap. 71-72). The court found that the plaintiffs had failed "to illustrate affirmatively the superior accuracy of the adjusted counts either (1) at any level mentioned in Guideline One, or (2) for any reasonable definition of accuracy" (*id.* at 78).

government by the Fifth Amendment (*id.* at 31-33). The court interpreted the district court's decision as having "implicitly found that the census did not achieve equality of voting power as nearly as practicable" (*id.* at 34). The court also characterized the decision to adhere to an acknowledged undercount as one which "disproportionately denies representation on the basis of race or ethnicity" (*ibid.*). Both consequences were identified as requiring heightened constitutional scrutiny (*id.* at 33-34).

Under established congressional redistricting standards, the court of appeals noted that once a plaintiff had shown "that a scheme was not the product of a good-faith effort to achieve equality, 'the burden shift[s] to the [governmental entity] to prove that the population deviations in its plan were *necessary* to achieve some legitimate state objective'" (*id.* at 37 (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (emphasis added)). The court held that "the findings of the district court . . . plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable" (*id.* at 38). In particular, the court identified the Secretary's acknowledgement that the adjusted numbers would likely make the census more accurate nationally and reduce the disparate impact of census inaccuracies on minority groups (*ibid.*). The court pointed to the Secretary's valuing distributive over numeric accuracy, his concerns regarding potential manipulation of, and disincentives to, participation in future censuses and the foreseeability of the differential undercount as further evidence of his failure to make the required good faith effort (*id.* at 38-39). Summarizing, the court stated "that plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable" (*id.* at 39). The court's only conclusion regarding the adjustment decision's effect on equality of representation in Congress was in its characterization of the Secretary's decision as "declin[ing] to make the generally improving

adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate" (*id.* at 38). Other than noting that census inaccuracies could affect equality in intrastate redistricting (*id.* at 33), the court did not discuss the adjusted and unadjusted numbers' impact on equality in state-created congressional and legislative districts. Stating that the proper standard of review was not the arbitrary and capricious standard but the "more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity" (*id.* at 39-40), the court held that the burden shifted to the Secretary to show that the result of undercounting minorities furthered a legitimate governmental objective and was essential for the achievement of that objective (*id.* at 40).

Dissenting, Judge Timbers endorsed the thoroughness and reasoning of the district court's opinion and noted the conflict created by the court of appeals' decision with decisions of the Sixth and Seventh Circuits in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992) (Pet. App. 40).

SUMMARY OF ARGUMENT

1. *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2777 (1992), held that census decisions affecting the apportionment of Congress will be reviewed for consistency with the language of the Constitution and the constitutional goal of equal representation. In this case, plaintiffs' claim was not that a census procedure was constitutionally proscribed, as was asserted in *Franklin v. Massachusetts*, but that the Constitution mandated the use of additional procedures--here, statistical estimation techniques--in taking the 1990 census. Plaintiffs alleged that this methodological innovation was capable of

"correcting" unintended errors in the census potentially having representational consequences. The issue of whether the Secretary acted constitutionally in not substituting statistically adjusted census results for the population totals previously reported by the President and provided to the states is framed by the broader question of whether the Constitution recognizes a judicially enforceable right to specific census innovations which are claimed necessary to achieve the "most accurate census practicable."

Wisconsin submits that at least where the procedures selected for taking the census do not represent a retreat from past efforts to take an accurate census, the Constitution does not create an entitlement to specific, previously untried, census innovations. The recognition of a judicially enforceable right to the most accurate census practicable conflicts with Congress' express constitutional and historically exercised authority to direct the manner of taking the census. U.S. Const. art. I, § 2, cl. 3. There is a fundamental difference between constitutionally proscribed census decisions and constitutionally mandated procedures. There are many procedures capable of improving census accuracy. No matter what procedures are selected, there will always be other procedures capable of producing a more accurate census. A standard of consistency is not a standard of mandated actions. As reflected in the Constitution's grant of congressional authority to determine the best way of taking the census, the choice of census procedures is an inherently legislative function involving complex technical and policy trade-offs, often entailing resource allocation decisions. As two decades of protracted litigation demonstrate, determining the impact of adopting a given census procedure on equality of representation rests on complex and highly uncertain predictions.

Recognizing a judicially enforceable right to procedures claimed necessary to achieving the most accurate census practicable creates an unworkable system of census governance. The census is a process intended to

confer finality and certainty in the decennial reallocation of rights of political representation. The strict statutory timetable established for taking, completing and reporting the census and for reallocating rights of representation in the national government based on its results reflects the need for finality. Claims to specific census innovations which result in litigation spanning more than half the decade can have no other consequence than to throw into disarray the already-completed process of state redistricting. Recognizing a constitutional entitlement to specific census innovations threatens the Balkanization of census decisions, as states forego Congress in favor of individual district court actions, to secure those procedures viewed as conferring the greatest benefit in the count. That census decisions have representational consequences is a truism. Yet, as recognized by the Seventh Circuit, claims to specific census innovations do "not ask [courts] to decree equality. . . . [but] to take sides in a dispute among statisticians, demographers, and census officials . . . ." *Tucker*, 958 F.2d at 1418. Simply by directing apportionment in accordance with the decennial census, "Article I, section 2, clause 3 does not authorize law suits founded on disagreement with the Census Bureau's statistical methodology." *Ibid.*

2. In this case, the Second Circuit erred in concluding that the Secretary had failed to make a good-faith effort to achieve equality of representation as nearly as practicable and that the census denied representation on the basis of race or ethnicity. Because these conclusions were wrong, the court erred in holding that the adjustment decision was to be reviewed under heightened equal protection standards.

The application of Art. I, § 2 redistricting standards to census decisions is problematic. Good faith in redistricting reflects the objective feasibility of creating equal population districts, measured by a "relatively rigid mathematical standard," *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 464 (1992). Here, the Secretary

was faced with a myriad of complex statistical arguments regarding the relative distributional accuracy of two imperfect sets of census results, making the substitution of census numbers technically and constitutionally perilous. Because the constitutional purpose of the census is to allocate rights of political representation based on the distribution of the population among and within the states, the Secretary's focus on distributive, rather than numeric accuracy, did not demonstrate an absence of good faith, but the opposite.

The court of appeals wrongly concluded that the district court had "implicitly found" that the census failed to achieve equality of representation as nearly as practicable. With respect to the census's impact on intrastate redistricting, the court of appeals failed to recognize the plaintiffs' ability to use the adjusted numbers for redistricting subsequent to the district court's ordering the data's release. With respect to the census's impact on equality in the apportionment of Congress, the Second Circuit's characterization of the PES apportionment as "just as accurate" as the census apportionment meant that plaintiffs had not met the threshold burden, required even in Art. I, § 2 redistricting cases, of demonstrating improved equality of representation in Congress. *Karcher v. Daggett*, 462 U.S. at 730-31. Plaintiffs' failure to meet this burden was also reflected in the district court's express finding that they had failed to demonstrate the superior accuracy of the adjusted numbers at the national, state or local level and for any reasonable definition of accuracy.

The Second Circuit's concern regarding the differential undercount of minority populations was understandable but did not support its conclusion that the census denied representation on the basis of race or ethnicity. Representatives in Congress are apportioned to states, not to racial or ethnic groups. The question of whether the census denies representation on the basis of race or ethnicity is the same as whether the apportionment of Congress is wrong. Unless this is demonstrated, shifting seats in the House of Representatives from states with

relatively small, to states with relatively large, minority populations accomplishes nothing more than an arbitrary reallocation of rights of political representation.

3. Under *Franklin v. Massachusetts*' standard of consistency with the language of the Constitution and the constitutional goal of equality of representation, the Secretary's decision was constitutional. Plaintiffs did not contend that adherence to the 200-year practice of actual enumeration was inconsistent with constitutional text or history. Conflicts with constitutional language and principles were, however, present in the PES. The substitution of the estimates for the reported census would have disrupted on-going state redistricting efforts, a result conflicting with both the goal of equal representation and the need for census finality. State estimates were based on samples taken in other states, conflicting with the constitutional requirement that Congress be apportioned on the basis of each state's population. U.S. Const. art. I, § 2, cl. 3; amend. XIV, § 2. By removing the incentive to take part in the census, estimation would make future censuses more difficult to conduct, also hindering the goal of representational equality by causing future inaccuracies. More broadly, estimation acquiesces in citizen non-participation in the processes of self-government, particularly among those groups which have been least included in the political process. Vulnerable to political manipulation and producing highly unstable results, statistical estimation undermines the perception of legitimacy in the allocation of rights of political representation among and within states.

The Secretary's decision was consonant with the goal of equality of representation. Very serious concerns existed regarding the quality of the PES estimates, particularly as affecting their distributional accuracy. The district court held that the Secretary's comprehensive evaluation of the technical and policy issues bearing on adjustment had been reasonable. In this circumstance, the choice of census results was one necessarily "command[ing]

far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S. at 464. The adjustment decision was constitutional.

ARGUMENT

I. THE RECOGNITION OF CLAIMS OF CONSTITUTIONAL ENTITLEMENT TO SPECIFIC CENSUS INNOVATIONS CONFLICTS WITH CONGRESS' CONSTITUTIONAL AUTHORITY TO DIRECT THE MANNER OF TAKING THE CENSUS AND CREATES AN UNTENABLE SYSTEM OF CENSUS GOVERNANCE.

A. Article I, § 2, cl. 3 (The Apportionment Clause), as amended by Section 2 of the Fourteenth Amendment, provides for the apportionment of Representatives in the House of Representatives among the states "'according to their respective Numbers,'" and directs that the "actual Enumeration" be taken every ten years, "in such Manner as [Congress] shall by Law direct." With the adoption of the Sixteenth Amendment, the census has the single constitutional purpose of providing the states' populations for apportioning Congress. *Carey v. Klutznick*, 653 F.2d 732, 736 (2d Cir. 1981), *cert. denied*, 455 U.S. 999 (1982).

Montana, 503 U.S. at 457-58, held that decisions affecting the apportionment of Congress are justiciable. *Franklin v. Massachusetts* extended this holding to census decisions affecting the apportionment, 112 S. Ct. at 2776 n.2, stating that census decisions would be reviewed under a standard of consistency with the language of the Constitution and the constitutional goal of equal representation. *Id.* at 2777. The specific question in this case is whether the Secretary's decision not to substitute statistically estimated population totals for the 1990 census was consistent with constitutional text and

principles. That issue is framed by the broader question of whether the Constitution mandates the adoption of specific census innovations claimed to be necessary to achieve the most accurate census practicable.

The recognition of a judicially enforceable right to compel specific census innovations conflicts with the Constitution's express grant of congressional authority to direct the manner of taking the census and Congress' historic exercise of that authority. If courts are to decide which procedures will achieve the most accurate census practicable, then unless Congress directs that the census be taken in a manner that a court agrees will achieve the greatest practicable accuracy, Congress' decision will be unconstitutional.[14] While not stated, the recognition of a constitutional right to specific census procedures necessarily assumes some basic institutional inability on the part of Congress to address problems in the census and to direct the taking of an accurate census. This is to say that the Founders of the Constitution erred in allocating this constitutional function to the Legislative Branch. Yet there appear to be few, if any, historical examples to support this view. To the contrary, in 200 years, the decennial census has evolved into a highly professional, methodologically sophisticated and costly operation which each decade attempts to count a larger proportion of the population. While the census continues to contain unintended errors, this case is not in the realm of the embedded and extreme inequality presented in *Baker v. Carr*, 369 U.S. 186 (1962).

Plainly, there are a number of census decisions which would be constitutionally proscribed as inconsistent with constitutional language or the goal of equal

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[14]This view is reflected in *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982), in which the question of whether the Constitution required an adjustment in the official population counts to reflect the differential undercount of minorities was held "not for the Congress, but for the judiciary."

representation. Conducting the census in a year not evenly divisible by ten, U.S. Const. art. I, § 2, cl. 3, assigning overseas military personnel to states based on place of birth, rather than "home of record" or other measure of current state ties,[15] delaying the reporting of census results until after the subsequent congressional elections or so late in the election cycle as to prevent their being used to reapportion Congress, or directing that census enumerators engage in substantially less canvassing of minority neighborhoods, are examples of census decisions which would be inconsistent with the language of the Constitution or its goal of representational equality.[16]

But plaintiffs' claim was not that the procedures employed in the 1990 census were constitutionally proscribed but that additional procedures were constitutionally mandated. A standard of consistency with constitutional goals and language is different from a standard of mandated actions. The possibility of alternative decisions being equally constitutional is suggested both in *Montana*, 503 U.S. at 463 ("The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course"), and *Franklin v. Massachusetts*, 112 S. Ct. at 2778 (finding Secretary's judgment to have been "consonant with, though not dictated by, the text and history of the Constitution"). As distinguished from congressional

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[15]*Cf. Franklin v. Massachusetts*, 112 S. Ct. at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment) (noting inability to change "home of record" designation after entering military service as implicating constitutional requirements of accuracy and decenniality).

[16]Because Congress retains the authority to alter the apportionment reported by the President, it can also correct census abuses as well as innocent inaccuracies. *See* 2 U.S.C. § 2a(b) (apportionment of Representatives shown on states' Certificates of Entitlement effective "in each Congress thereafter until the taking effect of a reapportionment under this section or *subsequent statute*" (emphasis added)).

apportionment,[17] decisions regarding the census are noteworthy not only because of the nearly limitless number of procedural choices available, but because many decisions would properly be regarded as consistent with constitutional language and the goal of representational equality, notwithstanding the likely superiority of alternative or additional procedures as giving more accurate counts.

Hiring 400,000 enumerators should produce a more accurate census than employing 300,000, yet either level would seem constitutionally permissible. Assigning more enumerators on a per capita basis to states with large numbers of non-citizens or linguistic minorities would appear constitutionally permissible, even though its necessary consequence would be to reduce the per capita assignment in other states. Ten attempts at non-response follow-up should yield more accurate counts than six attempts, which should yield more accurate counts than four attempts. Yet the Constitution would seem satisfied whether four, six or ten attempts are made. Because the census is used to allocate rights of political representation over the next ten years, a census taken on October 1 should be more accurate in terms of providing more current population totals than one taken on April 1. Yet the choice of an April 1 census data should also be constitutional. If a post-census sample of 377,000 people stratified among

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[17]In the case of apportionment, Art. I, § 2 requires that each state be apportioned at least one Representative and that there be no fewer than 30,000 inhabitants per Representative once each state has been apportioned one. Congress must also select an apportionment that is related to population. *Montana*, 503 U.S. at 463. Beyond this, it seems very likely that congressional apportionment is required to reflect rough proportionality to the states' populations--if a state with a population of 1,000,000 is apportioned two Representatives, a state with a population of 2,000,000 cannot be apportioned eight. It may be that because mathematical analysis has concluded that only five methods of apportionment lead to a workable solution of the fractional remainder problem, *see id.* at 451-52, the selection of one of these methods is required.

1,392 mutually exclusive demographic strata produces results whose bias and variability present improvement in the census's distributional accuracy, the Constitution does not mandate a sample of two million people next be taken.

Decisions regarding the best way of conducting the census necessarily "command[] far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S. at 464. Review of census decisions should reflect the need for prompt determinations of validity or invalidity, so as to limit the impact of review on census finality. This counsels courts to avoid transforming review of census decisions into legislative determinations of the procedures best capable of producing the most accurate census practicable. In general, where challenged census procedures represent the adherence to, or reasonable modifications of, previous census practices and do not represent a retreat from attempts to obtain an accurate census,[18] they should be sustained. In general, unless their adoption would conflict with other constitutional principles, innovations to improve coverage should be sustained. Particularly where challenged census action consists of a decision *not* to adopt a specific methodological innovation, the decision should be upheld. It is not that decisions not to adopt specific census innovations are unreviewable, but that in nearly all cases they are constitutional. *Cf. Montana*, 503 U.S. at 458 (decision that a constitutional provision may not be judicially enforceable "is of course very different from determining that specific congressional action does not violate the Constitution"). If exceptions need to be recognized to this standard, they are not presented by a case in which the innovation being advanced represents a departure from a 200-year practice

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[18] Thus, in arguing that a constitutional entitlement to specific census innovations should not be recognized, Wisconsin is not suggesting that the wholesale abandonment of prior census procedures, unless replaced by new ones, would not be subject to constitutional constraints. This is not, however, what was being alleged here.

of actual enumeration, in which intense professional and scientific debate exists as to the feasibility of the innovation and its potential for introducing new errors into the count, and in which significant policy reasons, many of constitutional stature, militate against the procedure's adoption.

States, municipalities, citizen groups and individuals perceiving an advantage in a particular procedure or methodological innovation are free to petition Congress for its adoption.[19] Because all states are represented in Congress, states which would be adversely affected by a particular innovation are able to advance their interests or to offer alternative procedures. The selection of the many procedures which actually go into the taking of the census represents the outcome of an evolutionary process in which innovations are conceived of, debated, developed, tested, implemented, retained and abandoned in an attempt to achieve more accurate counts each decade. Once the methods of taking the census have been selected, each state has the incentive to encourage the greatest census response on the part of its residents within the established methodological framework.

B. The recognition of a constitutional right to the most accurate census practicable not only conflicts with the Constitution's grant of congressional authority but results in an untenable system of census governance. The recognition of these claims encourages states and municipalities to eschew Congress in favor of individual district court actions to compel those innovations perceived as conferring the greatest benefit in the count. This has the potential of producing different, if not inconsistent,

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[19]Congress did not enact any of the legislation introduced before and after the 1990 census to compel its statistical adjustment. *See* Congressional Research Service, *Decennial Census Coverage: The Adjustment Issue*, at 23-27 (Feb. 1, 1994), for summary of legislation introduced in the 100th through 103rd Congresses relating to census adjustment.

judgments as each court focuses on the particular innovation advanced by the plaintiffs before it. Unlike Congress, where all states are represented, adversely affected states are likely to be heard at all only if they submit to the jurisdiction of a court which would not otherwise have jurisdiction over them.

Claims to the adoption of specific census innovations inherently conflict with the need for finality and certainty in the decennial reallocation of representational rights, both among and within the states. This need is reflected in the strict statutory timetable established by Congress for taking and completing the census, for reporting its results to Congress and to the states and for translating the results into entitlements to representation in the national government.[20] Protracted litigation as the vehicle for deciding the best way of conducting the census threatens substantial disruption of state redistricting efforts. The effect of changing census numbers on states whose apportionments would change is plain. A state told that it has one less Representative than before cannot hold elections with its current districts. But even states whose apportionments do not change will witness an apparent change in district populations when census results are changed. Because Art. I, § 2 imposes a standard of precise mathematical equality in congressional redistricting, *Karcher v. Daggett*, 462 U.S. at 734, already-established

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[20]Under the current census statutes, April 1 is established as the decennial census date. 13 U.S.C. § 141(a). Under 13 U.S.C. § 141(b), the Secretary of Commerce is required to report the states' population totals to the President by December 31 of the census year. Under 2 U.S.C. § 2a(a), the President is to report the states' population totals and the new apportionment to Congress within the first week of its first session in the year following the census, with the apportionment determined using the method of equal proportions. The President's report establishes a state's entitlement to a particular number of Representatives. *Franklin v. Massachusetts*, 112 S. Ct. at 2773 (plurality opinion). Within fifteen days after the President's report, the Clerk of the House of Representatives is required to send to each state's governor a Certificate of Entitlement showing the state's new apportionment. 2 U.S.C. § 2a(b).

districts can be claimed to be unconstitutional. Either under Art. I, § 2 or state constitutional provisions,[21] states may either feel or be compelled to draw new congressional and legislative districts. Whether a state retains or redraws its districts, its choice could easily trigger litigation. At the same time, litigation which spans half the decade determining the best way of taking the census can ultimately provide at most a formal, rather than real, improvement in equality of representation. Correction of population totals as they existed on April 1, 1990, become increasingly less relevant to true equality as the decade progresses, which is the reason a new census is taken at the decade's end. There might be cases where the need for census finality must give way to superior constitutional commands, as where plainly unconstitutional action is not discovered until after Congress' election under the new census. A claim that specific methodological innovations are necessary to achieving census accuracy does not present such a case.

A judicially enforceable right to the most accurate census practicable invokes no clear standard of constitutionality. Article I, § 2 redistricting standards are not successfully engrafted onto census decisions merely by substituting the phrase "as accurate as is practicable" for "as equal as is practicable." The concept of practicability with respect to census accuracy is defined over the set of all possible census procedures which might be used in counting the population. Available choices range from decisions as broad as the level of census appropriations to decisions as specific as the actual assignment of enumerators, the script to be followed during non-response follow-up, or the length and format of census questionnaires. As previous examples regarding constitutionally permissible census procedures suggest,

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[21]*See e.g.*, Wis. Const. Art. IV, § 3 ("At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants").

whatever procedures are selected for taking the census, additional procedures can always be posited for improving census accuracy. Doubling the expenditure for targeted outreach should make the census more accurate. If a 400,000-person sample fails to improve accuracy, a post-census sample of a million can be posited which might. The examples also point to the fact that the choice of census procedures is an inherently legislative task, requiring the balancing of technical and policy trade-offs, often entailing resource allocation decisions. Increasing enumerator positions reduces resources available for other census programs or for non-census expenditures. Changing the date for taking the census or for reporting its results may improve accuracy, but at the cost of shortening the time for states to accomplish redistricting.

Even if the concept of census "practicability" had obvious boundaries, determining the effect of a specific census procedure's adoption on equality of representation at best involves complex and uncertain judgments for which "[n]either mathematical analysis nor constitutional interpretation provides a conclusive answer."[22] *Montana*, 503 U.S. at 463. A court might be able to select census procedures believed to offer the best chances of ensuring the greatest number of people being counted, although it is unlikely to have any greater abilities in this regard than Congress or the Executive. But the constitutional basis for asking courts to compel specific census innovations is not the desirability of counting the greatest number of people but the ability to distribute the population correctly among the states. That the selection of census procedures will have representational consequences is a truism. Where small changes in state populations can change the

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[22]New York's and New Jersey's errors in predicting higher populations under statistical estimation present a good example. Philadelphia, also a plaintiff, would not only lose population as a share of the national total under the PES (A.R. App. 10 (June 13, 1991), Table 3 (estimated undercount 0.8% below national estimates)) but would suffer reduced representation in Congress resulting from Pennsylvania's loss of a House seat.

apportionment of Congress, the abstract recognition of the relation between census errors and representational rights does not confer the ability to predict accurately the impact of census innovations on representational equality.

The Sixth and Seventh Circuit's decisions in *Tucker v. U.S. Dept. of Commerce* and *City of Detroit v. Franklin* [23] reflect a deep and well-founded judicial skepticism, not as to the need for review of census decisions which contravene constitutional text or principles, but as to the courts' ability to mandate the adoption of specific census innovations in the guise of enforcing the Constitution.[24] In *Tucker*, a

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[23]Three court of appeals' decisions from the 1980 census concerned claims to statistical adjustment. *See Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980) (upholding preliminary injunction requiring procedures to correct errors in New York's and New York City's count; evidence of census undercount of minority populations held to establish likelihood of success on the merits in light of Art. I, § 2 congressional redistricting standard in *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), requiring voting equality "as nearly as is practicable"); *Carey v. Klutznick*, 653 F.2d 732 (2d Cir. 1981) (reversing and remanding district court's subsequent judgment on the merits; district court's broad sanction order for government's refusal to produce confidential master address registers held to punish unrepresented states which would be adversely affected by adjustment of single state's population by preventing full and fair disclosure of facts and adjudication of the merits), *cert. denied*, 455 U.S. 999 (1982) (*see also Klutznick v. Carey*, 449 U.S. 1068 (1980) (staying portion of district court's judgment enjoining the reporting of census results to President on December 31, 1980)); *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981) (reversing judgment compelling development of methods to statistically adjust census to correct for minority undercounts; plaintiffs held to lack standing and claim held not ripe because alleged loss of representation from undercount would result from the Michigan Legislature's intervening decision not to adjust the census in redistricting, which had not yet occurred), *cert. denied*, 455 U.S. 939 (1982).

[24]The Second Circuit's discussion of *Tucker* was limited to noting the Seventh Circuit's recognition that in redistricting cases plaintiffs are not required to prove that districting inequalities represent a deliberate effort to dilute an affected group's voting power (Pet. App. 36, citing *Tucker*, 958 F.2d at 1414). The court of appeals' decision did not discuss *City of Detroit*.

group of Illinois plaintiffs alleged that the existence of a differential undercount in the 1990 census would "cause[] them to lose representation in the House of Representatives and a fair share of federal and state funds allocated on the basis of the census figures." *Id.* at 1412. The plaintiffs' suit sought to compel "an appropriate statistical adjustment for the undercount," *ibid.*, as part of the decennial census. The district court had dismissed the claim as presenting a non-justiciable political question. *Tucker v. U.S. Dept. of Commerce*, 135 F.R.D. 175 (N.D. Ill. 1991). On appeal, the Seventh Circuit ruled that the claim was not justiciable because the plaintiffs lacked standing in the sense of having litigable rights. *Tucker*, 958 F.2d 1415-17.

Decided a few months before *Franklin v. Massachusetts*, *Tucker* was predictive of the standard of review of census decisions subsequently established by this Court. The Seventh Circuit understood the plaintiffs' claim to be that without a statistical adjustment they would lose congressional representation.[25] While stating that the case was not a reapportionment case, *Tucker*, 958 F.2d at 1415, the court of appeals held that the claim was not barred under the political questions doctrine, stating that "the political sensitivities that might have been thought to bring the apportionment cases within the scope of the political questions doctrine, but did not, are not greater here." *Ibid.* The court also recognized the judiciary's ability to decide census questions where established constitutional principles provide the grounds for the decision, as in a case "concern[ed] with discrimination rather than innocent inaccuracy" or, with greater reservations, with respect to a challenge to "some categorical judgment of inclusion or exclusion argued to be

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[25]*Tucker*, 958 F.2d at 1415-16 (noting that litigation had not been allowed to proceed to the point where the plaintiffs would be required to specify the adjustment sought, preventing a determination that they had nothing to gain from winning the case).

in violation of history, logic, and common sense." *Id.* at 1418 (citing *Com. of Mass. v. Mosbacher*, 785 F. Supp. 230 (D. Mass. 1992) (three-judge court), *rev'd sub nom., Franklin v. Massachusetts*, *supra*. In contrast to these types of claims, the Seventh Circuit held that merely by directing congressional apportionment in accordance with the decennial census, "Article I, section 2, clause 3 does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." *Tucker*, 958 F.2d at 1418. Unable to find in the apportionment clause, the census statutes or the Administrative Procedure Act guidelines for taking an accurate decennial census, the court stated:

> So nondirective are the relevant statutes that it is arguable that there is no law for a court to apply in a case like this, . . . --that you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness.

Id. at 1417-18 (citations omitted). Contrasting the judicially administrable standard of voting equality in redistricting cases, the court characterized the plaintiffs' claim as one not asking a court to decree equality but "to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount." *Id.* at 1418.

In *City of Detroit*, the Sixth Circuit followed the Seventh Circuit's reasoning to uphold summary judgment dismissing a claim seeking to compel statistical adjustment of the 1990 census or to compel a recount of Detroit's residents. 4 F.3d at 1375-78. Concluding that states could use statistically adjusted census data in congressional redistricting, the court also affirmed the dismissal of a claim for lack of standing that unadjusted census data

would result in inequalities of representation in state redistricting. *Id.* at 1373-74.

The Sixth and Seventh Circuit's negative assessment of the courts' ability to decree equality by taking sides in disputes regarding the Census Bureau's statistical methodology resonates in the Constitution's positive grant of census authority. The issue raised by plaintiffs' claim is not whether a given census innovation is permissible, or even desirable, but whether the Constitution creates an entitlement to its adoption. The goal of equality is not demeaned, but respected, by recognizing the limits of the courts' ability to perform the inherently legislative function of determining how best to take the census. The existence of an unbounded set of procedures having the potential for improving census accuracy, the complex policy and technical calculus involved in the selection of census procedures, and the still greater complexity of determining the relation between census procedures and their impact on equality of representation make the decision whether to employ specific methodological innovations one for Congress, as the Constitution directs.

II. BY MISAPPREHENDING THE RELATION BETWEEN CENSUS ACCURACY AND EQUALITY OF REPRESENTATION, THE COURT OF APPEALS ERRED IN HOLDING THAT THE ADJUSTMENT DECISION WAS SUBJECT TO HEIGHTENED EQUAL PROTECTION SCRUTINY.

A. In concluding that Secretary Mosbacher had not made the required effort to achieve equality as nearly as practicable, the court of appeals referred to "Congress's expressed intent to encourage such use [of statistics]" (Pet. App. 38), an apparent reference to the court's earlier

holding that 13 U.S.C. § 195[26] does not preclude the use of sampling in the taking of the reapportionment census. The court held to the contrary that the statute's legislative history revealed "that a statistical adjustment to the initial enumeration is not barred by the Census Act and indeed was meant to be encouraged" (Pet. App. 25).

The court incorrectly interpreted § 195. When enacted in 1957, § 195 permitted the use of sampling "[e]xcept for the determination of population for apportionment purposes."[27] The current statutory language reflects its 1976 amendment (P.L. 94-521, 90 Stat. 2464) to require, rather than simply permit, sampling where feasible. The same law amended 13 U.S.C. § 141(a) to authorize the Secretary of Commerce to determine the "form and content" of "the decennial census of the population . . . including the use of sampling procedures and special surveys." The court of appeals correctly viewed the legislative history of the amendments to §§ 141(a) and 195 as revealing a congressional intent to encourage the use of sampling. *See* Pet. App. 24-25. However, the same legislative history, like the express language of § 195 both before and after amendment, specifically excepted the use of sampling for apportionment

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[26]"Except for the determination of population for purposes of apportionment of Representatives among the States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. § 195.

[27]As originally enacted, 13 U.S.C. § 195 provided: "Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." P.L. 85-207, § 14, 71 Stat. 484.

purposes.[28] The term "census of the population," as used in § 141(a) is defined in § 141(g) to mean a "census of population, housing, and matters relating to population and housing." No conflict exists between § 195's prohibition of sampling for purposes of obtaining the population used in apportionment and § 141(a)'s and § 195's encouragement of sampling for other purposes. When determining the apportionment census, the Secretary is not authorized to use sampling. For other census purposes--such as determining the portion of a state's population living in owner-occupied housing--the Secretary is encouraged to use sampling, where feasible.[29]

B. The court of appeals' greater error lay in concluding that the enumeration census denied representation on the basis of race or ethnicity and that the Secretary had failed to make the required good faith effort to achieve equality of representation as nearly as practicable. Based on these conclusions, the court incorrectly held that the adjustment decision was subject

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[28]The court of appeals quoted the language of S. Rep. No. 1256, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5468, which states:

> Section 10 amends section 195 of title 13, U.S.C., to require that the Secretary of Commerce authorize the use of sampling procedures in carrying out the provisions of this title whenever he deems it feasible, except in the apportionment of the U.S. House of Representatives. This differs from present language which grants the Secretary discretion to use sampling when it is considered appropriate. The section as amended strengthens congressional intent that, whenever possible, sampling shall be used.

The court emphasized the last sentence (Pet. App. 25).

[29]Thus, the *in pari materia* construction of §§ 195 and 141 as permitting sampling in the apportionment census in *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980), and followed by the district court here (Pet. App. 110 n.7) is incorrect.

to heightened scrutiny under Art. I, § 2 congressional redistricting standards and under equal protection standards governing racial classifications.

The ability to engraft Art. I, § 2 redistricting standards onto census decisions is problematic. In the case of intrastate congressional districting, "Article I, § 2 . . . 'permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.'" *Karcher v. Daggett*, 462 U.S. at 730 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). The ability to put forward a redistricting plan, either considered by the Legislature or developed by the plaintiff, which achieves smaller population deviations than the state plan establishes a state's failure to make a good faith effort to achieve equality of representation as nearly as practicable.[30] The concept of good faith reflects objective feasibility rather than an impressionistic assessment of subjective purpose.

In contrast to state redistricting standards, for the 1990 census no rigid formula existed for determining whether the estimated population totals were better than the original census in the constitutionally relevant sense of improving equality of representation in Congress. Instead, the Secretary was presented with a myriad of complex statistical arguments, subject to intense dispute among statisticians and demographers, concerning the relative distributional accuracy of two sets of numbers, each known not to represent "true" population totals.

The concerns identified by the court of appeals as underlying the decision not to adjust read not as an indictment of the decision but as proof of the Secretary's reasoned evaluation of an exceedingly complex and constitutionally perilous issue. As summarized by the

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[30]Thus, in *Karcher v. Daggett*, the plaintiffs were able to sustain their threshold burden by pointing to several plans considered, but not adopted, by the New Jersey Legislature which resulted in smaller population deviations than the 0.6984% maximum deviation under the challenged plan. 462 U.S. at 738.

court, the Secretary was concerned that adjustment might result in an incorrect apportionment of Congress (Pet. App. 19, 38). Half of his advisors believed that accuracy at the state and local levels would not be improved (*id.* at 19). Uncertainty as to the methods of adjustment and their underlying assumptions created the danger that an adjustment would be made on the basis of research conclusions that might well be reversed in the next several months (*ibid.*). Because the effects of different adjustment methods could be known in advance, the adjustment process might become subject to political manipulation (*id.* at 19, 38). The Secretary also found that adjustment would not result in greater distributive accuracy and that statistical estimation would undermine future census participation by removing the incentive for states to cooperate in the census (*id.* at 38).

Given its interpretation of the district court's decision as having "implicitly found" that the census failed to achieve equality of representation and its characterization of the Secretary's adherence to the census as denying representation on the basis of race or ethnicity (*id.* at 34), the court of appeals' decision suggests that the court viewed the adjusted numbers as clearly superior to the enumeration census in terms of achieving equality of representation either with respect to the apportionment of Congress or in state redistricting. Yet other parts of the decision contradict this interpretation. In summarizing the adjustment decision, the court stated that the Secretary had "conced[ed] that the adjustments would likely bring greater accuracy in the count at the national level" but that he had expressed a principal concern "that adjustment might not improve distribution of Representatives among the states" (*id.* at 19). The court returned to the effect of adjustment on congressional apportionment in summarizing its reasons for finding that the Secretary had not made a good faith effort to achieve equality of representation. The court pointed to the Secretary's statement "that an adjustment would not be made because it would not result in *greater* distributive accuracy," as

revealing that "he would decline to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate" (*id.* at 38 (emphasis in the original)). The court did not state that the evidence established that the adjusted counts resulted in the correct apportionment of Congress or that adherence to the original counts caused an incorrect apportionment. The court of appeals did not make any finding with respect to the adjusted numbers' impact on equality of representation in intrastate districting and did not discuss the plaintiffs' ability to achieve intrastate equality by using the adjusted data ordered released more than a year before.

The court emphasized the perceived numeric accuracy of the adjusted numbers, particularly at the national level, as a key fact demonstrating the Secretary's lack of good faith. The court's emphasis on numeric accuracy not only highlights its misconception of the relation between census accuracy and equality of representation but underscores the Secretary's good faith in *not* focusing on this aspect of census accuracy. A census which achieves "true" numeric accuracy in the count of the national population has no inherent superiority over one which does not. What makes one set of numbers constitutionally superior is its ability to distribute correctly a given national population among the states. If this occurs, it is constitutionally irrelevant whether the national count is half or double its "true" level or somewhere in between. The same percentage distribution of the national population among the states will result in the same apportionment, regardless of the level of the national population. Unless they result in the correct distribution of the national population, improvements in the numeric accuracy of state population totals are similarly uninformative on the issue of representational equality. Adding 30,000 to the population total of a state whose "true" undercount was 50,000 would improve the

numeric accuracy of the state's count, as would adding 120,000 to the population of a state whose "true" undercount was 80,000. But if the result would be to cause the first state to lose a seat in Congress, to which it would be entitled under the states' "true" populations, equality of representation does not improve, but deteriorate, by increasing numeric accuracy.[31]

The Art. I, § 2 redistricting standard relied on by the court of appeals places the burden on parties challenging a state's plan to establish that population differences could have been reduced or eliminated by a good-faith effort to draw equal population districts (Pet. App. 36-37, citing *Karcher v. Daggett*, 462 U.S. at 730-31). In redistricting cases, this threshold burden is met by a plaintiff's putting forward a plan which achieves smaller population deviations than those under the state plan. The failure to come forward with such a plan defeats a plaintiff's claim. *See Karcher v. Daggett*, 462 U.S. at 731 ("if [redistricting plaintiffs] fail to show that the differences could have been avoided the apportionment scheme must be upheld"). If standards for congressional redistricting are to be applied to the census, the ability to point to a different apportionment using a different set of census totals does not answer whether the new apportionment improves equality of representation. *Cf. Franklin v. Massachusetts*, 112 S. Ct. at 2778 (although different apportionment would have resulted from exclusion of overseas personnel from apportionment census, "certainly appellees have not demonstrated that eliminating overseas employees entirely from the state counts will make representation in Congress more equal"). Even accepting the court of appeals' characterization of the PES apportionment as being "just as accurate" as the census apportionment, "just as accurate" does not mean a better apportionment, only a different apportionment. The

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[31] An example of increased numeric accuracy causing representational equality to worsen is contained in the Secretary's adjustment decision (Pet. App. 183).

district court did not "implicitly" find that the census failed to achieve equality of representation as nearly as practicable. Rather the district court expressly found that plaintiffs failed to demonstrate at the national, state or local level, and for any reasonable definition of accuracy, that the adjusted numbers were superior to the census (Pet. App. 78).

C. The court of appeals' concern regarding the persistence of the differential undercount of minorities was understandable. But the existence of the differential undercount did not warrant the conclusion either that the Secretary had failed to achieve equality of representation as nearly as practicable or that the census denied representation on the basis of race or ethnicity.

To the extent the Second Circuit conceived of a right to be counted in the census, independent of the impact of census inaccuracies on equality of representation, its analysis of the census's differential count of minorities was not consistent with established Equal Protection principles. An equal protection violation based upon racial discrimination requires proof of discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 239-245 (1976). Here, plaintiffs did not allege any discriminatory purpose. Neither the adjustment decision nor the procedures selected for taking the enumeration census give the least hint of discriminatory purpose. The 1990 census was noteworthy for its concerted and comprehensive efforts to count minority residents.

The court of appeals' decision did not focus on the differential undercount's impact on non-representational interests, but on its effect on the allocation of representational rights. In this regard, the court of appeals did not err in concluding that a denial of representation on the basis of race or ethnicity does not require proof of discriminatory purpose. *Accord Tucker*, 958 F.2d at 1414 (redistricting cases do not place on plaintiffs any burden of proving that a malapportionment represents a deliberate effort to dilute some group's voting

power). If anything, positing a differential undercount as the reason for a loss of representation offers to prove more than is necessary. If the numbers used to apportion Congress result in an unintended but nevertheless avoidable malapportionment, then from a constitutional standpoint it does not matter why this has occurred but *that* it has occurred. *See ibid.* (in redistricting cases, "[i]t is enough that the state's electoral districts *are* malapportioned.")

Instead, the court of appeals' error lay in its assumption that the existence of the undercount differential meant that representation had been denied to begin with. Representatives in Congress are apportioned to states, not racial or ethnic groups. Every state has racial and ethnic minorities, and the effect of changing a state's apportionment is the same for all its residents, regardless of race or ethnicity. Taking a House seat from Wisconsin reduces the representation of black voters in Milwaukee to the same extent as it reduces the representation of white voters in Green Bay, Menominee voters in Keshena and Hmong voters in Eau Claire. Whether a particular ethnic or racial group's representational rights can be improved through a different apportionment of Congress is the same question as whether the apportionment can be improved. Unless adjustment will improve equality of representation in Congress, all that is accomplished by shifting seats in Congress from states with relatively small minority populations to states with relatively large minority populations is an arbitrary reallocation of rights of political representation.

The differential undercount provides a highly stylized reason for why the census *might* result in inequality of representation in Congress. It does not answer the question of *whether* this has occurred or, if it has occurred, how to correct it. The complex texture of the PES estimates involved much more than the measurement

of racial and ethnic undercount differentials nationally.[32] More importantly, there was no finding that the census resulted in inequality in the apportionment of Congress or that the adjusted numbers would improve equality. Accordingly, the court of appeals erred in holding that the adjustment decision was subject to heightened equal protection scrutiny.

III. THE SECRETARY'S DECISION WAS CONSTITUTIONAL.

A. Plaintiffs did not contend that the decision to adhere to the enumeration census contravened constitutional text or history. To the contrary, over and above the broader conflict between claims of constitutional entitlement to specific census innovations and Congress' constitutional and historically exercised authority to direct the manner of taking the census, aspects of the PES conflicted with constitutional language and principles.

Even if the Secretary's decision regarding the use of the adjusted numbers had not led to further litigation, the PES numbers would have been untimely. The actual post-census survey was not begun until nearly three months after the April 1 census date. Because of the process's complexity, initial results of the PES were not reported until April 1991 and revised estimates were not reported until June 1991, which continued to contain errors not corrected until the following spring. The evaluation of the estimates was not sufficiently completed to permit a decision until July 15, 1991. The adjustment decision,

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[32]If all that mattered to the states' census coverage rates was the proportion of their populations consisting of minority racial and ethnic groups, the PES would have looked much different than it did. States such as Rhode Island, Massachusetts, Pennsylvania and Wisconsin would not have had estimated undercount rates below the average for non-Hispanic whites nationally, and states like New Jersey, Michigan and Illinois would not have undercount rates roughly half those estimated for Montana, Wyoming and Idaho. *See* A.R. App. 10 (June 13, 1991, Release), Table 5.

therefore, was not made until more than six months after the President's report of the states' apportionments to Congress, 2 U.S.C. § 2a, and more than three months after the time established for the provision of P.L. 94-171 data for use in state redistricting. 13 U.S.C. § 141(c). The substitution of the adjusted numbers for the enumeration census would have required states to begin again the politically complex task of redistricting or--what would have been still more disruptive--to become embroiled in litigation as to the numbers to be used in redistricting. Efforts to achieve greater census accuracy at the cost of impairing the states' ability to establish new districts and hold elections present no clear improvement in representational equality.

Adjusting the census would have represented the first time in the nation's history that the states' apportionment populations would have been based on counts in other states (Pet. App. 251-52). Statistically, this fact implicates the problem of assuming homogeneity of the sample strata--the assumption, for example, that African-American residents of Madison had the same chance of being counted in the census as their post-stratum counterparts living in Peoria. Yet Wisconsin showed a significant increase in its African-American population between 1980 and 1990--indicating relatively recent immigration into the state--not witnessed in other states in the East North Central census region.[33] Constitutionally, the reliance on sample observations in other states to

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[33]Wisconsin's African-American population grew by 33.5% during the decade of the 1980's, compared to less than a 4% overall increase in the state's population--one of the reasons the state was able to retain a ninth House seat. During the same period, growth rates in African-American populations in the other East North Central states ranged from 1.2% in Illinois to 7.9% in Michigan. Source: U.S. Department of Commerce Bureau of the Census, *1980 Census of Population: General Social and Economic Characteristics*, United States Summary at 1-277, Table 232 (1983); U.S. Department of Commerce Bureau of the Census, *1990 Census of Population: Summary Population and Housing Characteristics*, United States Summary at 59, Table 2 (1992).

estimate a state's population conflicts with the requirement that representation in Congress be based on the states' populations, "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2.

The use of statistical estimation techniques to "correct" the results of the enumeration census also meant that state and local officials would no longer have an incentive to encourage residents to take part in the census. A significant problem in the 1990 census was a lower than anticipated response rate during the initial mail-out/mail-back phase (Pet. App. 15, 327-28). Wisconsin actively encouraged its residents' participation in the census, achieving the highest voluntary response rate in the nation (J.A. 95-101; A.R. App. 6 at 40). To reward these efforts and this accomplishment by taking away the state's ninth House seat could not send a clearer message regarding the value of performing this single duty of national residence. Undermining the ability to achieve accuracy in future censuses impairs, and therefore conflicts with, the goal of equality of representation.

More broadly, the use of statistical estimation acquiesces in broader trends of citizen non-involvement in the processes of self-government, particularly among population groups whose historic underinclusion in the census has corresponded to a much greater, and much more serious, underinclusion in the political process. The PES penalized states, like Wisconsin, whose high rate of voluntary census participation corresponded to high rates of voter participation. This result is contrary to the constitutional judgment reflected in Section 2 of the Fourteenth Amendment that equality of representation is furthered by apportioning representation in the national government in proportion to the degree that states have effectively extended the right to vote.[34] Similarly,

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[34]Wisconsin imposes a ten day residence requirement on voting and does not require voter registration. *See* Wis. Stat. § 6.55 (eligible voters permitted to vote by producing evidence of current address on day of election). According to Census Bureau estimates, Wisconsin's level of

statistical estimation undermines the perceived legitimacy of the allocation of representational rights at both the state and national level. *Cf. Montana*, 503 U.S. at 465-66 (noting states' and nation's acceptance for half a century of congressional apportionments based on method of equal proportions as factor supporting method's constitutionality). Procedures selected for taking the enumeration census--expanded targeted outreach programs, increases in enumerators assigned to canvass minority neighborhoods, simplified census forms--will have representational consequences, but these are very difficult to know in advance. *See* Pet. App. 228 ("small changes in the census enumeration can move seats in the House . . . but no individual involved in the enumeration process can predict how"). In contrast, the extreme sensitivity of the statistical estimates to modeling assumptions and methodological choices opens the process to political manipulation. Beyond this, no state would view as legitimate a loss of representation from that already established by the President which may represent nothing more than random sampling error, which results from a statistical process that introduces as many sources of error as it is attempting to "correct," which is based on a sample that includes only 141 blocks from within the state and which estimates the state's population using sample observations primarily from other states.

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voter participation is significantly higher than national averages, both for minority and non-minority voters. *See* U.S. Department of Commerce Bureau of the Census, *Current Population Reports, P 20-440*, "Voting and Registration in the Election of November 1988" at 36-40 (1989); U.S. Department of Commerce Bureau of the Census, *Current Population Reports, P 20-466*, "Voting and Registration in the Election of November 1992" at 23-30 (1993). *See also* The Council of State Governments, *The Book of States 1994-95* at 226, Table 5.9 (Voter Turnout For Presidential Elections: 1984, 1988 and 1992) (1994). The provision of Section 2 of the Fourteenth Amendment for a reduction in the states' apportionment populations in the proportion to the percentage of male citizens whose right to vote "is denied . . . or in any way abridged" has been held a political question. *Sharrow v. Brown*, 447 F.2d 94 (2d Cir. 1971), *cert. denied*, 405 U.S. 968 (1972).

B. At the very least, the Secretary's decision was consonant with the goal of equal representation.

The issue is framed by the availability of two sets of census numbers, each different from the other down to the block level. The *ex post* availability of two census results resolves plaintiffs' claim that a failure to estimate the census would result in representational inequality in the creation of their own congressional and legislative districts. "The simple answer . . . is that [plaintiffs do] not have to utilize the census figures in apportioning [their] legislative districts . . . ." *Cuomo v. Baldridge*, 674 F. Supp. at 1105 n.31.[35] The district court ordered the release of adjusted block-level data to the plaintiffs two and a half years ago (Pet. App. 91-95). To the extent plaintiffs have not used the adjusted data to draw new districts, their commitment to principles of equality, like their belief in the superior accuracy of the adjusted counts, rings hollow.[36] To the extent the plaintiffs have redrawn

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[35]*Accord, Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992) (if state knows that census data are under-representative, it "can, and should, utilize noncensus data in addition to the official count in [the] redistricting process"); *Assembly of State of Cal. v. U.S. Dept. of Commerce*, 968 F.2d 916, 918 n.1 (9th Cir. 1992); *City of Detroit*, 4 F.3d at 1373-74; *Young v. Klutznick*, 652 F.2d at 624-26. *See also Kirkpatrick v. Preisler*, 394 U.S. at 535 (suggesting approval of population inequalities in congressional districts to reflect anticipated population shifts if population trends are thoroughly documented and applied in a systematic, and not *ad hoc*, manner).

[36]While it is difficult to have confidence in the interpretation of other states' redistricting statutes and case law, Wisconsin is not aware of any plaintiff state whose legislative or congressional districts were established after the district court ordered the release of the block-level adjusted data. *See e.g.*, N.Y. State L. (McKinney 1995) § 111 (congressional districts, effective June 11, 1992), § 121 (legislative districts, effective May 4, 1992); Ariz. Rev. Stat. Ann. (1994) § 16-1102 (legislative districts, effective June 16, 1992); *Arizonans For Fair Representation v. Symington*, 828 F. Supp. 684 (D. Ariz. 1992) (three-judge court) (congressional districts), *aff'd mem. sub nom., Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 113 S. Ct. 1573 (1993).

their districts, an order compelling a mid-decade change in the decennial census is unnecessary. New York City does not have an interest in compelling Oklahoma's or Indiana's use of the adjusted numbers.[37]

The *ex post* availability of two sets of census results also changes the evaluation of plaintiffs' claim to a specific census innovation. In their complaint, plaintiffs presented a plausible theory for why anticipated errors in the census might result in reduced representation. The claim went beyond a critique of census accuracy to offering a specific, previously untried, method for "correcting" the results of the decennial census. As it turned out, neither claim was correct. While a differential undercount was confirmed, the PES did not change the congressional apportionment of five of the plaintiff states, and both New York and New Jersey would have lost population as a share of the national total under the adjusted numbers. That two of the plaintiff states would have each gained a seat in the House of Representatives under the estimated counts merely begged the question of whether they were entitled to additional representation--and whether Wisconsin and Pennsylvania deserved to lose representation--under the states' "true" populations.

In *Franklin v. Massachusetts*, the challenged census decision was the inclusion of overseas populations in the states' apportionment totals based on "home of record" data. The allocation of overseas personnel to the states had occurred two other times, in 1900 and 1970. 112 S. Ct. at 2771. "Home of record" data were known to exhibit a

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[37]In addition, the provision of census data used in state redistricting is statutory. *See* 13 U.S.C. § 141(c). To the extent this statutory function makes the adjustment decision reviewable under the Administrative Procedure Act's arbitrary and capricious standard, *see Franklin v. Massachusetts*, 112 S. Ct. at 2782 (Stevens, J., concurring in part and concurring in the judgment), the plaintiffs did not challenge, and the court of appeals did not disturb, the district court's findings that the Secretary's decision satisfied this standard.

high "error rate" and possibly little correlation with an employee's true feelings of state affiliation. *Id.* at 2786 (Stevens, J., concurring in part and concurring in the judgment). Indeed, a man or woman who designated a home of record upon entering military service could not change it later. *Id.* at 2786 n.22. Nevertheless, the Court concluded that the Secretary's decision to include this very imprecise measure of the states' overseas populations "does not hamper the underlying constitutional goal of equal representation, but assuming the employees temporarily stationed abroad have indeed retained their ties to their home States, actually promotes equality." *Id.* at 2778 (opinion of O'Connor, J.). The members of the Court who viewed the decision as reviewable under the APA's arbitrary and capricious standard found it to have been neither. *Id.* at 2786-87 (Stevens, J., concurring in part and concurring in the judgment).

Here, the Secretary's decision rested on a comprehensive evaluation of highly technical issues of statistical interpretation. Given that the distributional accuracy of the PES determined its impact on equality, it was consistent with the goal of equality of representation for the Secretary to weigh the many sources of error that impaired the distributional quality of the estimates. For example, it was consistent with the goal of representational equality for the Secretary to question the validity of the PES's central assumption of sample homogeneity, where substantial evidence contradicted the assumption. It was also consistent with the goal of equal representation for the Secretary to be concerned that the estimates had been derived under severe time constraints, employing untested modeling assumptions. It was consistent to consider the estimate's instability with respect to congressional apportionment.

Again, a standard of consistency is different from one of mandated actions. Where statisticians intensely disagree as to whether a sample has been constructed, taken and statistically manipulated in a manner that yields a "better" distribution of the population, a decision

regarding the choice of census totals necessarily "commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S. at 464. Stated otherwise, a state's claim to an additional House seat which is premised on a modeling decision to exclude 28 out 1,392 variance outliers during variance "pre-smoothing" does not invoke "a substantive standard of commanding constitutional significance." *Id.* at 463. Even those tending to favor adjustment, which included the Census Bureau's director and the district judge himself, found the Secretary's technical and policy evaluation reasonable. If it was reasonable to conclude that the adjusted numbers would not improve, and possibly worsen, the distributional accuracy of the census, it was consonant with the goal of equal representation not to substitute the adjusted numbers for those officially reported. The Secretary acted constitutionally.

CONCLUSION

The judgment of the court of appeals should be reversed and the judgment of the district court affirmed.

Respectfully submitted,

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Nos. 94-1614, 94-1631, 94-1985 (Consolidated)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF WISCONSIN,
Petitioner,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

STATE OF OKLAHOMA,
Petitioner,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

UNITED STATES DEPT. OF COMMERCE, *et al.*,
Petitioners,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER STATE OF OKLAHOMA'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether the decision of the Secretary of Commerce not to statistically adjust the 1990 census is consistent with the mandate of Article I, § 2, cl. 3 of the United States Constitution that "[t]he actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct."

2. Whether the opinion of the Court of Appeals is inconsistent with *United States Dept. of Commerce v. Montana*, 503 U.S. 442 (1992), and *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992), and in conflict with *Tucker v. United States Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S.Ct. 407 (1992), and *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S.Ct. 1217 (1994).

3. Whether the Court of Appeals erred in imposing upon the Secretary of Commerce the heightened burden of showing that the decision furthers a governmental objective that is legitimate and is essential for the achievement of that objective.

PARTIES TO THE CONSOLIDATED PROCEEDINGS

Petitioners, defendants below, are: United States Department of Commerce; Ronald H. Brown, Esq., As Secretary of the United States Department of Commerce; Everett Ehrlich, As Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; Harry Scarr, As Acting Director of Bureau of Census; William J. Clinton, As President of the United States; Dan Glickman, As Secretary of Agriculture; Donna E. Shalala, As Secretary of Health and Human Services; Henry Cisneros, As Secretary of Housing and Urban Development; Robert B. Reich, As Secretary of Labor; Federico Peña, As Secretary of Transportation; Richard W. Riley, As Secretary of Education.

Petitioners, intervenor-defendants below, are: State of Oklahoma; State of Wisconsin.

Respondents, plaintiffs below, are: City of New York; State of New York; City of Los Angeles; City of Chicago; City of Houston; Dade County, Florida; United States Conference of Mayors; National League of Cities; League of United Latin American Citizens; National Association for the Advancement of Colored People; Marcella Maxwell; Donald H. Elliott; John Mack; Olga Morales; Timothy W. Wright, III; Raymond G. Romero; Antonio Gonzales; Athalie Range; Jerry Alan Wood; Carolyn Sue Lopez; City of Atlanta, Georgia; Maynard Jackson, Individually, and as the Mayor of the City of Atlanta; Florida House of Representatives; Florida State Conference; Miguel A. De Grandy; Willye Dennis; Mario Diaz-Balart; Dr. Charles Evans; Rodolfo Garcia, Jr.; Bollowy L. "Bo" Johnson; Alfred J. Lawson, Jr.; Willis

Logan, Jr.; Johnnie McMillan; Alzo J. Reddick; Peter Rudy Wallace; T.K. Wetherell; State of Texas; City of Phoenix, Arizona; State of New Jersey; State of Florida; City of Cleveland, Ohio; City of Denver, Colorado; City of Inglewood, California; City of New Orleans, Louisiana; City of Oakland, California; City of Pasadena, California; City of Philadelphia, Pennsylvania; City of San Antonio, Texas; City of San Francisco, California; Broward County, Florida; State of Arizona; City of Baltimore, Maryland; City of Boston, Massachusetts; City of Long Beach, California; City of San Jose, California; Los Angeles County, California; San Bernadino County, California; District of Columbia; Navajo Nation; State of New Mexico; City of Tucson, Arizona; Council of Great City Schools.

Additional respondent, defendant below, is: Donnald K. Anderson, As Clerk of the United States House of Representatives.

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No. 94-1614, No. 94-1631, No. 94-1985 (Consolidated)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF WISCONSIN,

Petitioner,

v.

CITY OF NEW YORK, et al.,

Respondents.

STATE OF OKLAHOMA,

Petitioner,

v.

CITY OF NEW YORK, et al.,

Respondents.

UNITED STATES DEPT. OF COMMERCE, et al.,

Petitioners,

v.

CITY OF NEW YORK, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER STATE OF OKLAHOMA'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit ("Second Circuit") is reported at 34 F.3d 1114 (2nd Cir. 1994). Pet. App. 1.[1] The opinions of the United States District Court for the Eastern District of New York are reported at 822 F. Supp. 906 (E.D.N.Y. 1993), 739 F. Supp. 761 (E.D.N.Y. 1990), and 713 F. Supp. 48 (E.D.N.Y. 1989). Pet. App. 46, 104 and 130, respectively. The decision of the Secretary of Commerce is published at 56 Fed.Reg. 33582 (July 22, 1991). Pet. App. 146.

JURISDICTION

This case is before the Court by writ of certiorari granted September 27, 1995, to review the judgment of the United States Court of Appeals for the Second Circuit. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2, clauses 1 and 3, and Section 8, clause 18, of Article I of the United States Constitution; Sections 2 and 5 of the Fourteenth Amendment; 2 U.S.C. § 2a; and 13 U.S.C. §§ 141(a) and (b) and 195 are reproduced at App., *infra* 1a-6a.

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[1]References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 94-1631.

STATEMENT OF THE CASE

On November 3, 1988, the City and State of New York, the State of California, and several other cities, public interest groups and individuals brought this suit to compel the Department of Commerce and the Bureau of the Census to require a statistical adjustment of the 1990 decennial census count in order to reduce the anticipated undercount of the population.

Pursuant to a stipulation in the litigation, the Secretary of Commerce (the "Secretary") agreed to consider the question of whether the census headcount should be statistically adjusted.[2] Pursuant to the court-approved stipulation, the Secretary published a set of Guidelines for evaluating the adjustment question. One of those, Guideline Five, required the Secretary to decide whether any adjustment of the 1990 census would violate the United States Constitution or federal statutes. While he acknowledged unsettled judicial opinion as to whether adjustment violates 13 U.S.C. § 195, the Secretary stated in the commentary which accompanied his final decision: "the majority of courts considering the issue have ruled that section 195 permits an adjustment if the adjustment method makes the census more accurate [citations omitted]." 56 Fed. Reg. 33582, 33606, Pet. App. 254, 257.

The Secretary concluded that whether a chosen method of adjustment would violate the Constitution and federal statutes depends upon whether accuracy of the census is improved. Because he found other compelling reasons not to adjust, "legal considerations did not provide a basis for [his] decision." 56 Fed. Reg. at 33606, Pet. App. 258.

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[2] Oklahoma was not a party to the stipulation.

In 1991, the Secretary decided not to substitute adjusted numbers for those numbers reported by President Bush for apportionment of Congress and which were then used by the States, including Oklahoma, in redistricting. The Secretary's decision was consistent with two hundred years of adherence to a census based upon actual enumeration.

On April 13, 1993, the Secretary's decision not to adjust the census enumeration was upheld by the district court on the basis of the administrative record and the additional evidence presented at a lengthy trial. *See City of New York v. United States Dept. of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993). The district court, applying an "arbitrary and capricious" standard under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), determined that the Secretary's decision was reasonable.

On August 8, 1994, a divided panel of the Second Circuit reversed and remanded to determine whether the decision not to adjust was necessary to the achievement of a legitimate governmental purpose. *City of New York v. United States Dept. of Commerce*, 34 F.3d 1114 (2nd Cir. 1994). The Second Circuit concluded that § 195's prohibition against census adjustment for apportionment purposes, when read with § 141, actually encourages adjustment. *Id.* at 1125. The court also found that an adjusted census would be more accurate for "most purposes" and thus the Secretary's rejection of adjustment should be subject to heightened scrutiny. *Id.* at 1131. The late Judge Timbers dissented from the opinion. *Id.* at 1131-1132. He recognized that the majority's decision conflicted with two other circuit decisions, *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S.Ct. 1217 (1994), and *Tucker v. United States Dept. of Commerce*, 958 F.2d

1411 (7th Cir.), cert. denied, 113 S.Ct. 407 (1992), which had earlier upheld the Secretary's decision to not adjust the census.

SUMMARY OF ARGUMENT

The Census clause of the Constitution states that the decennial census shall be taken "in such Manner as [Congress] shall by Law direct." Congress exercised this power and enacted the Census Act which directs the manner in which the census is taken. Congress allows statistical sampling to be utilized for some census purposes but it expressly prohibits the use of sampling for the count used in the apportionment of Representatives. Thus, although the Secretary did not base his adjustment decision on the express prohibition of § 195, this legislative directive bars statistical adjustment until such time as Congress determines otherwise.

The decision of the Secretary of Commerce not to adjust the 1990 census complies with Congress' directive. It is consistent with the clear language of the statute, with its legislative history, the Constitution, and with the two hundred year tradition of following a method of actual enumeration.

Congress' decision not to adjust commands deference from the judiciary. The business of census taking is clearly committed to Congress, not the courts. Congress has the power to enact any legislation "necessary and proper" to carry out its duties. Congress has done so and its policy choice must be respected. If the standard of "actual enumeration" is ever to be definitionally and fundamentally changed, it must occur through Congress and not through any other branch of government. Judicial review must

accord great deference to the broad mandate given to Congress and the two hundred year history of conducting a census based upon an actual count of the people. The sole inquiry is whether the decision not to make a statistical adjustment to the actual enumeration is consistent with the text and authorization of the Constitution.

The constitutional role of the census is to resolve the struggle for political power -- not create a method for seizing political power. If post-enumeration adjustments can be made to the actual headcount, then the door has been opened for adjustments motivated by partisan interest.

Congress' prohibition against census adjustment also guards against politicizing the constitutional role of the census and furthers political stability at both the national and state levels. The census is the key to the reorganization of the legislative branch. The census must be available within the timetable imposed by law in order for the legislature to determine its own composition and continue the business of government without a delay or a break. If census adjustment and the selection of a formula become the subject of litigation, then timing is lost and the process falters.

Neither the Constitution nor the statutes address adjustment formulas. There are no legal guidelines which a court could apply to census methodology to determine which formula is the "best" or the one required by law. The concept of voter equality also fails to give guidance. The goal of equal representation does not tell a court how to determine what census methodology.

The Second Circuit's ruling also conflicts with the decisions of the Sixth and Seventh Circuits, *City of Detroit*, 4 F.3d at 1378 and *Tucker*, 958 F.2d at 1419. The latter

correctly concluded that disagreement with census methods does not create a constitutional claim.

Although Oklahoma contends otherwise, if the Court concludes that adjustment is a permissible choice under the law and then focuses on the Secretary's decision not to adjust, it is clear that his decision is nonetheless not subject to the heightened scrutiny imposed by the Second Circuit. Heightened scrutiny is not applicable because no constitutional rights were violated by the decision not to adjust. There is no constitutional right to census accuracy. The fact that the census undercount disproportionately affects minorities does not justify a higher standard of review. There is no allegation that the census was conducted in a manner to purposefully or intentionally undercount minorities. The district court properly reviewed the Secretary's decision under an arbitrary and capricious standard.

ARGUMENT

I.

13 U.S.C. § 195 PROHIBITS THE STATISTICAL ADJUSTMENT OF THE DECENNIAL CENSUS FOR APPORTIONMENT PURPOSES.

The narrow issue before this Court is whether the Court of Appeals for the Second Circuit correctly held that the Secretary must prove that his decision not to statistically adjust the 1990 census furthers a legitimate governmental objective and his decision is essential for achievement of that objective. *City of New York*, 34 F. 3d at 1131. This narrow issue, however, triggers the broader question: what do the

Constitution and statutes direct with respect to census adjustment? In this case, the Secretary's decision not to adjust was constitutionally permissible and statutorily required. A decision in favor of adjustment would have been contrary to the governing legislative mandate.

A. The Constitution Gives Congress The Power To Decide The Census Method; Congress Used This Power To Prohibit Adjustment.

The Constitution imposes two requirements on the census. It has to be taken every ten years and it must be taken in the manner specified by Congress:

> The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

U.S. Const. Art. I, § 2, cl. 3.

Congress exercised the power granted to it by the Constitution and passed the Census Act. Within the Census Act, Congress decided that when a census is used to apportion Representatives,[3] the Secretary cannot use sampling to adjust the actual enumeration:

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[3] The Constitution requires that the decennial census be used to apportion representatives "among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. Art. 1 § 2, cl. 3.

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195. App., *infra* 6.

Congress also decided that when a census is used for purposes other than apportionment, sampling is permissible:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

13 U.S.C. § 141.

Under § 141, Congress authorized the Secretary to use sampling and special surveys to collect different types of information which are targeted by the census. As defined by § 141, the census collects information beyond a population count. It inquires into housing matters and related issues and other subjects chosen by the Secretary. 13 U.S.C. § 141(g) ("census of population" defined to mean a census of population, housing and matters related to population and housing); 13 U.S.C. § 141(f) (Secretary shall submit, for

congressional approval, the subjects proposed to be included and the types of information to be compiled in the census).

In this case, the Secretary's decision not to adjust the census complies with the Constitution and with the Census Act. The Secretary conducted the census in "such Manner as [Congress] shall by Law direct" because he complied with § 195's prohibition against adjustment. Congress directs that sampling shall not be used for apportionment purposes and the Secretary did not do so. As a matter of law, the Secretary could not have decided otherwise.

B. The Statutory Text Is Clear; Adjustment Is Prohibited.

The conclusion that Congress prohibits the statistical adjustment of the census for apportionment is consistent with the Constitution, it is consistent with § 141(a), and it is consistent with § 195. The text is clear. The analysis should end. *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Id.* at 108; *Negonsott v. Samuels*, 113 S. Ct. 1119, 1123 (1993) (Court's task is to give effect to Congress' will and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive). When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). As Justice Holmes emphasized, "We do not inquire what the legislature meant; we ask only what the statute means." *S & E Contractors, Inc. v. United States*, 406

U.S. 1, 14 n. 9 (1972), *quoting* Holmes, *The Theory of Legal Interpretation*, 12 Harv.L.Rev. 417, 419 (1899).

In the debate over adjustment, however, much has been made of a perceived conflict between §§ 141(a) and 195. In order to resolve this supposed conflict and give meaning to both provisions, reviewing courts have reached the strained conclusion that sampling is permissible for apportionment purposes, but not required, and if used, it must be done in conjunction with traditional counting methods. *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *see also City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980) (Constitution's "actual enumeration" requires that census be at least based on raw data obtained by actual headcount but § 195 permits sampling for apportionment purposes, though it does not require sampling); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), rev'd on other grounds, 642 F.2d 617 (6th Cir. 1981) (§ 195 merely prohibits the use of figures derived solely by statistical techniques; it does not prohibit the use of statistics in addition to traditional measuring tools to arrive at more accurate population count).

In this case, the district court also held that to give effect to both §§ 195 and 141(a), it must be concluded that, in the apportionment area, sampling may be used but only in addition to traditional counting methods. *City of New York v. United States Dept. of Commerce*, 739 F. Supp. 761, 767-68 (E.D.N.Y. 1990). The Second Circuit concluded that § 195 actually encourages census adjustment for apportionment purposes. *City of New York*, 34 F.3d at 1125.

The most obvious problem with this application of §§ 141(a) and 195 is that it ignores the clear language of both

statutes. In interpreting a statute a court should always turn first to one cardinal canon before all others. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 1149, *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981).

Section 195 does not say that sampling *may* be used for apportionment or that sampling can be a *part* of the apportionment count.[4] Section 195 clearly states that sampling shall not be utilized to obtain the count which is used for the apportionment of congressional representatives. 13 U.S.C. § 195.

Similarly, § 141(a) does not say that sampling can be used for apportionment. Instead, it provides that sampling can be used with the census. The remaining provisions in §141 direct that the census shall obtain different types of information which are used for different purposes. Sampling may be perfectly appropriate to arrive at a count which

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[4] It has been concluded that when Congress amended § 195 in 1976, it intended to strengthen the use of sampling where apportionment was not involved and thus substituted "shall" for the word "may." *City of New York*, 34 F.3d at 1125; *Young*, 497 F. Supp. at 1334. Under this analysis, sampling is permissible for apportionment but cannot be a required component of an apportionment count. This analysis ignores that Congress, even when amending, retained the plain prohibition of § 195. Notedly, the Secretary retains discretion in both the original and amended versions of § 195. The original version authorizes sampling when "he deems it appropriate" and the amended version directs sampling "if he considers it feasible." 13 U.S.C.§ 195.

reflects housing, education, income or vocation patterns. When a count is used to apportion representatives, however, sampling is not permitted. 13 U.S.C. § 195.

C. The Legislative History Supports The Conclusion That § 195 Prohibits Adjustment.

Although not necessary to resolve this issue, the legislative history of § 195 supports the conclusion that this section actually means what it says and prohibits the use of sampling for apportionment purposes. When § 195 was first enacted in 1957,[5] the House Report stated:

> Section 195 provides that the Secretary of Commerce may authorize the use of the statistical method known as sampling in carrying out the purposes of title 13, if he deems it appropriate. However, section 195 does not authorize the use of sampling procedures in connection with the apportionment of Representatives.
>
> The purpose of section 195 in authorizing the use of sampling procedures is to permit the utilization of something less than a complete enumeration, as implied by the word "census," when efficient and accurate coverage may be affected through a sample survey. Accordingly, except with respect to

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[5] As originally enacted, § 195 stated: "Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

> apportionment, the Secretary of Commerce may use sampling procedures when he deems it advantageous to do so.[6] [Emphasis added.]

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[6] U.S. Cong. House Comm. on Post Office and Civil Service. Revision of Census Law. Report to Accompany H.R. 7911. H.R. Rep. No. 1043, p. 10, 85th Cong. 1st Sess. Washington, U.S. Govt. Print. Off., 1957, *and cited in* Cong. Res. Serv. Rep. for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, pp. 85-86, 96th Cong., 2d Sess. (Comm. Print 1980).

Rep. Beckworth also entered a statement into the record that recognized the census collects different types of information in addition to a headcount and that sampling may be proper for the collection of this information: "The use of sampling procedures would be authorized by the proposed new section 195. It has generally been held that the term 'census' implies a complete enumeration. Experience has shown that some of the information which is desired in connection with a census could be secured efficiently through a sample survey which is conducted concurrently with the complete enumeration of other items; that in some instances a portion of the universe to be included might be efficiently covered on a sample rather than a complete basis and that under some circumstances a sample enumeration or a sample census might be substituted for a full census to the advantage of the Government. This section . . . would give recognition to these facts and provide the necessary authority to the Secretary to permit the use of sampling when he believes that it would be advantageous to do so." Hearing, H.R. 7911, 85th Cong., 1st Sess. (June 19, 1957) *and cited in* Cong. Res. Serv. Rep. for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, 96th Cong., 2d Sess. (Comm. Print 1980).

The Senate Report also stated that sampling was not permitted for apportionment:

> A third part of section 14 gives the Secretary authority to use sampling in connection with censuses except for the determination of the population for apportionment purposes. The proper use of sampling methods can result in substantial economies in census taking.[7]

When enacted, § 195 prohibited the use of sampling to arrive at a population count for apportionment. When Congress amended § 195 in 1976, it did not substantially change the language of that provision. Most significantly, the 1976 amendment did not remove the reference to apportionment. If Congress originally meant to exclude sampling from apportionment and it left that exclusion in when it amended the statute, then one must conclude that the prohibition remains in force. This conclusion is further supported by the legislative history behind the 1976 amendment to § 195. The focus of the 1976 amendments to the Census Act was to provide for a mid-decade census, *not*

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[7] S. Rep. No. 698, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1706, 1708.

to address sampling or adjustment.[8] Section 141(a) was amended to distinguish between the two censuses and:

> New language is added at the end of the subsection to encourage the use of sampling and surveys in the taking of the decennial census.

S. Rep. No. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5466.

The 1976 amendment revised § 195 to:

> require that the Secretary of Commerce authorize the use of sampling procedures in carrying out the provisions of this title whenever he deems it feasible, except in the apportionment of the U.S. House of Representatives. This differs from present language which grants the Secretary discretion to use sampling when it is considered appropriate. The section as amended strengthens congressional intent that,

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[8] "The main purpose of the 1976 amendment was to provide for a mid-decade census to be used for various purposes (not including apportionment)." *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2784 n. 16 (1992). *See also* S. Rep. No. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5463, "The Committee . . . to which was referred the bill (S. 3688) to amend title 13, United States Code, to provide for a mid-decade census of population, and for other purposes . . ." *and* the Statement portion of the Senate Report which contains an extensive review of the rationale behind a mid-decade census.

whenever possible, sampling shall be used. [Emphasis added.][9]

The text is clear and the legislative history is clear. Section 195 originally prohibited sampling for apportionment and it still does. Here, the litigation debate between the Executive Branch members and those favoring adjustment has focused primarily on whether the Secretary's administrative decision was constitutionally flawed. Oklahoma, on the other hand, contends adjustment is prohibited and the Secretary had *no* authority to decide other than as he did. The real question should be, if § 195 means what its plain language says, is the statute unconstitutional?

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[9] S. Rep. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5468. Also, in 1980, a bill was introduced which would have specifically amended §§ 141(a) and 195 to "require the bureau of the Census to adjust the population figures, employing the best available methodology to correct for undercounting for all purposes, including reapportionment." S. 3063, 96th Cong., 2d Sess. (1980), 112 Cong. Rec. at S. 22,856 (daily ed. Aug. 25, 1980). The bill was rejected. Statistical adjustment of the census for apportionment purposes was not adopted.

In 1980, a report was prepared by the Congressional Research Service for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, 96th Cong., 2d Sess., (Comm. Print 1980), which supports this conclusion. After an extensive analysis of constitutional and statutory provisions and the legislative history of the Census Act and its amendments, the Report concluded that the use of sampling for apportionment purposes is not prohibited by the Constitution but is prohibited by § 195. The Report found that sampling could be used for all other purposes of the decennial census. Report, at p. 88.

If not (because the manner of conducting the census is textually delegated to Congress), then a decision consistent with this plain language should not be subject to challenge.

Finally, even if § 195 can somehow be read to not expressly prohibit a statistical adjustment for apportionment purposes, no basis exists to set aside the Secretary's decision. If, contrary to Oklahoma's reading, Congress has statutorily allowed the Secretary to have this option, the Constitution permits Congress this type of judgment. That being the case, there is no basis to now set aside the Secretary's decision, in the absence of any claim that the Secretary has carried out the census count contrary to the instructions of Congress.

II.

CONGRESS' LEGISLATIVE DECISION REQUIRES JUDICIAL DEFERENCE, FURTHERS THE IMPORTANT GOALS OF POLITICAL STABILITY AND PUBLIC CONFIDENCE AND INVOKES NO JUSTICIABLE STANDARDS.

A. The Statutory Prohibition Against A Census Adjustment Commands Deference From The Judiciary.

The Constitution does not specify the method for the census. Instead, the Constitution explicitly commits to Congress the decision of determining the "manner" in which the census is to be performed. The Constitution expressly directs Congress to use its discretion when exercising this power.

The Constitution also authorizes Congress to enact legislation that "shall be necessary and proper" to carry out its delegated responsibilities. U.S. Const. Art. I, § 8, cl. 18. Once an object is within the authority of Congress, the means by which it will be attained is for Congress to determine. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (it is not for courts to oversee the choice of boundary line in implementing federal statute nor sit in review on size of a particular project area; once the question of public purpose has been decided, the amount of land to be taken and the need for a particular tract to be used in the plan rests in the discretion of the legislative branch).

Within the limits of a constitutional grant, Congress may implement the stated purpose by selecting the policy which in its judgment best effectuates the constitutional aim; this is but a corollary to the grant to Congress of any Article I power. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966); *Kinsella v. United States*, 361 U.S. 234, 247 (1960) (as James Madison explained, the Necessary and Proper Clause is "but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant").

Congress answered the constitutional directive and decided that sampling should not be used for apportionment purposes. 13 U.S.C. § 195. Congress reviewed the adjustment issue in 1957 and in 1976. Each time, it chose not to allow a statistically estimated adjustment to the census for apportionment purposes. Its good-faith choice of an "actual enumeration" method, practiced for over two hundred years, commands deference from the judiciary. *United States Dept. of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992) (Congress' choice of apportionment method upheld; Congress' decision commands far more

deference than a state redistricting plan); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (judging constitutionality of Act of Congress is the gravest and most delicate duty that this Court performs and analysis begins with no less deference than the Court customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government); *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (Court should afford great weight to decisions of Congress even though legislation implicates fundamental First Amendment or equal protection rights).

B. Congress' Prohibition Against Census Adjustment Furthers Political Stability And Public Confidence.

Congress' decision that the decennial census should not be statistically estimated for apportionment purposes furthers the important goals of political stability and public confidence in government. At the heart of Oklahoma's concern is whether, without a thorough policy debate in Congress, the important limitation contained in § 195 is going to be read out of the statute. If that occurs, even judicial deference to the Secretary's current decision will subject an important national process to the political arena. The process employed for future censuses would be viewed as a politicized one, and the attendant loss of integrity insurmountable. If one administration can make post-enumeration adjustments to the actual headcount, then any methodology for adjustments will be subjected to partisan argument.

Likewise, if the judiciary should enter the business of managing the census, then both federal and state political processes would be, at best, disrupted, and at worst, halted.

If census adjustment were permissible, then any State which would lose a Representative under the formula adopted by the Census Bureau could find a different formula which arguably produced a "better count." Different formulas could create conflicting decisions among federal courts which would require perpetual resolution by higher courts and, ultimately, this Court. In this case, a decision *not* to adjust produced conflicting decisions involving three circuits: *City of New York*, 34 F. 3d at 1131, *Tucker*, 958 F.2d at 1419, and City of Detroit, 4 F.3d at 1378.

These types of conflicts take years to resolve. This challenge to the methodology of the 1990 decennial census began in 1988. This Court will receive argument in 1996. Over seven years of litigation have elapsed and the issue is not yet resolved. If yet another district court decision and appeal are required, the decennial census will have produced a decennial lawsuit!

These types of cases also involve enormous amounts of complex expert testimony and evidence. In this case, the trial lasted for 13 days, consisted almost exclusively of expert testimony and the transcript exceeded 2,600 pages. One exhibit alone contained over 12,000 documents and 18,000 pages. *City of New York*, 822 F. Supp. at 917. If litigation becomes the method of choosing a census adjustment formula, then the process of seating the government will be placed on hold until the last judicial review occurs. A delayed count or a substituted count becomes a realistic possibility.

The prospect of judicial scrutiny and debate over the choices of census methodology threatens the machinery of government at the national and state levels. The census is an integral part of the ignition system. It is essential and it

must fire on time. If it is missing or if it fires late, then the machinery does not work.

By statute, the census must be completed and the results reported to the President within nine months after April 1st of the year in which the census is performed. 13 U.S.C. § 141(b). The President must notify Congress, within one week of commencement of the first regular session, of the number of representatives to which each State is entitled. 2 U.S.C. § 2a(a). Within fifteen days of the President's notification, the Clerk of the House of Representatives must send this information to the Governor of each State. 2 U.S.C. § 2a(b). If the count is delayed, then these events will not occur within the statutory timetable. As long as there is no final count, districts within States cannot be drawn and representatives cannot be elected.

A delayed census puts the entire process on hold. Neither the Constitution nor the statutes anticipate that a census count may be held up while the judiciary reviews or replaces an adjustment formula. There is no statutory or constitutional procedure to use in the interim. Political stability and public confidence are lost when government is halted because it cannot determine even its own composition.

A cornerstone of our constitutional system of government is the ability to convene a properly constituted and recognized government in a timely manner without protracted constitutional challenges over reapportionment and the redistricting process. In Oklahoma, the transfer of state political power is keyed to the decennial census. Oklahoma is bound by its state Constitution to use the census to draw its congressional districts. The state Constitution also demands that redistricting be completed quickly: within ninety (90) days after the convening of the first regular

session of the state legislature following the federal decennial census. Okla. Const. art. V, § 11A.

Developing a state redistricting plan is a monumental task. In Oklahoma, it encompasses districts for 101 state representatives, 48 state senators and 6 Congressmen. Jt. App. at 103.[10] After legislative boundary lines are drawn, county commissioners in each of Oklahoma's 77 counties must redraw their district boundaries. Each county must also redraw its precincts. It requires extensive commitments of time, resources and money. Oklahoma spent over $1 million on its 1991 redistricting alone. Jt. App. at 105.

It is also unclear how a repeat run would occur. Oklahoma's Constitution did not anticipate that the federal decennial census might result in two counts or in a delayed count. The state Constitution does not provide for a procedure for a retake and it is not even clear who would perform the second round of redistricting. The Oklahoma Constitution states that an Apportionment Commission shall be created if the legislature fails to make the required apportionment within the time provided. Okla. Const. art. V, § 11A. Resolution of whether a three person committee or the legislature should redistrict would undoubtedly create debate and litigation and would not be conducive to political stability or public confidence in government.

Political stability at both the federal and state level is obviously a vital concern. It is also a concern that is directly impacted by census adjustment. Congress' decision

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[10]References to "Jt. App." are to the joint appendix filed in this appeal.

not to adjust the census solves the problem because it allows the legislative branch to change its composition without delaying or halting the business of government.

C. No Justiciable Standards Exist For Reviewing The Census.

The analysis of whether an issue presents a claim that can be resolved by justiciable standards is often made in the context of the political question doctrine. The Court rejected that doctrine in a case which concerned Congress' selection of apportionment methods. *Montana*, 112 S. Ct. at 1430. Although it is now questionable whether the doctrine could be applied here to say the conduct of the census presents a non-justiciable question in the constitutional sense,[11] an analogy can clearly be drawn between elements of the doctrine and this case. This analogy leads to the conclusion

---

[11] *See Nixon v. United States*, 113 S. Ct. 732 (1993) (claim that Senate rule violated Impeachment Trial Clause was nonjusticiable; the word "try" in that clause does not provide an identifiable textual limit on the authority committed to the Senate); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (Court found no justiciable claim; where Constitution gives Congress the power to prescribe military training, judiciary should not undertake to review a wide range of possible procedures; such a review would be inappropriate even in the unlikely event that the judge possesses the requisite technical competence to do it).

In this case, as in *Nixon*, there is no constitutional or statutory text under which to resolve the issue and assess census methodology. The phrase, "in such manner as [Congress] by law shall direct" does not provide a sufficient textual basis to create a justiciable standard.

that courts should not manage the business of taking the census.[12]

Here, the Constitution's explicit textual language, unaccompanied by any restrictions, makes clear that the "manner" of conducting the census is committed to Congress. By virtue of this language, "responsibility for conducting the decennial census rests with Congress." *Baldridge v. Shapiro*, 455 U.S. 345, 347-48 (1982).

Neither the statutes nor the Constitution speak to the issue of standards. As recognized by the Seventh Circuit Court of Appeals:

---

[12] Under the political question doctrine, judicial review should be declined where there is:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Montana, 112 S. Ct. at 1424, *citing Baker v. Carr*, 369 U.S. 186 (1962).

> The plaintiffs' claim to a census adjustment invokes no judicially administrable standards. The plaintiffs are not asking us to decree equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount.

Tucker, 958 F. 2d at 1418.

In the trial of this case, the district court was asked to review an enormously complex adjustment proposal but with no legal standards to use to judge it. This proposal: (1) created 1,392 poststrata on the basis of age, sex, race, Hispanic origin, housing tenure, the type of place and geographic location; (2) utilized a "homogeneity assumption" that persons in each poststratum were homogeneous with respect to the probability of being missed by the census; (3) identified 5,000 blocks which fairly represented these poststrata; (4) calculated 1,392 poststratum raw adjustment factors to reflect variations found in the Post-Enumeration Survey ("PES") conducted within these 5,000 blocks; (5) "smoothed" the 1,392 raw factors by both "modelling" and "regression" exercises; and (6) used a mathematical model to impute missing characteristics in order to match the census record to the PES to determine whether an undercount occurred. The accuracy of the adjusted count was checked against a Demographic Analysis ("DA") which estimated population and subpopulations through administrative records such as birth and death certificates and immigration statistics. *City of New York*, 822 F. Supp. at 915-16, 921, 923.

There are no justiciable standards which the district court could have used to decide whether the proposed 1,392 "smoothed," "modelled" and "regressed" adjustment factors are the best factors to use. There are no legal standards by which to gauge imputation and undercount ratios or the variance of the PES from the DA. There are no standards and no law to apply to a given formula to determine whether it is required or even permissible.

The power to exercise discretion to decide census methodology is clearly committed to the Congress, not the judiciary. A court's independent decision on this question would ignore Congress' right to direct the census process and demonstrate a lack of respect for that branch of government. Regardless of one's interpretation of 13 U.S.C. § 195, the policy for the past two hundred years has been to use an actual count and *not* to statistically adjust the census.

Finally, adjustments beget adjustments. If left to judicial review, this issue could result in different courts choosing different paths for one census, in the quest for greater accuracy. The lack of identifiable standards almost guarantees that not all courts would take the same side in a dispute among census officials, statisticians and demographers.

III.

CENSUS ADJUSTMENT IS NOT REQUIRED BY EITHER THE CONSTITUTION OR THE GOAL OF VOTER EQUALITY.

Nothing in the Constitution requires that Congress adjust the census. In this case, there is no allegation that intentional discrimination against a protected class caused the census undercount. Those in favor of adjustment may contend that the Constitution creates a right of census accuracy or that adjustment is required under the one-person-one-vote standard announced by this Court in prior cases. *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Karcher v. Daggett*, 462 U.S. 725 (1983). Neither the Constitution nor voter equality compels statistical adjustment of the census.

The Constitution's text does not address census accuracy. It does not require a specific level or type of accuracy and it does not specify the means to obtain a census count, accurate or otherwise.

As held in *Montana*, the one-person-one-vote standard does not provide the means to resolve all issues in this area: "The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course." *Montana*, 112 S. Ct. at 1429. This Court recognized in *Montana* that the goal of absolute mathematical equality is illusory under the constraints imposed by the Constitution. The constitutional guarantee of a minimum of one Representative for each State and the need to allocate a fixed number of Representatives among 50 States of different populations make absolute voting equality impossible. *Id.* at 1429.

Neither the Constitution nor the goal of voter equality provides a standard by which a court can choose a particular formula to adjust the census. Neither source gives guidance as to whether 5,000 blocks or 10,000 blocks should be used or where those blocks should be located or whether 1,392 strata are sufficiently homogeneous to support an adjustment formula. Neither source determines whether it is best to have a final count which is more accurate from the standpoint of total numbers but is less accurate with respect to distributing those numbers across the United States.

In this case, the Secretary's decision not to adjust was based, in part, on his conclusion that there was "little or no evidence that the adjusted counts led to greater distributive accuracy at local levels." *City of New York*, 822 F. Supp. at 922. There are no standards under which a court could decide whether total number accuracy or distributive accuracy is required by the law.

Neither the Constitution nor the goal of voter equality determines whether it is best to leave real people in the count or remove them and replace them with a "best guess." The adjustment formula proposed in this case would delete actual people and replace them with an adjusted number. *Id.* at 922, n. 21. The deletion of real people from the final count could undermine the public's willingness to respond to the census. If one is going to be replaced by a "best guess" then one may not take the time to send in the form. It may also diminish the incentive of local governments to make efforts to increase census participation. A State may instead choose to concentrate on lobbying for a particular adjustment formula. Neither of these results lead to a more accurate census.

IV.

THE FINAL RESULT REACHED BY THE SIXTH AND SEVENTH CIRCUITS IS CORRECT.

The Second Circuit Court of Appeal's decision conflicts with the rulings of the Sixth and Seventh Circuits which upheld the Secretary's decision not to adjust the 1990 census. *City of Detroit*, 4 F.3d at 1378; *Tucker*, 958 F.2d at 1419. The latter decisions did not address § 195. Nevertheless, the Sixth and Seventh Circuits reached the correct result. Oklahoma was not a party to these cases.

Both the Sixth and Seventh Circuits recognized that the apportionment clause does not create a constitutional right to census accuracy. *City of Detroit*, 4 F.3d at 1375; *Tucker*, 958 F.2d at 1417. The Seventh Circuit reasoned:

> It might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census, for that would be some evidence that the framers of these various enactments had been trying to create a judicially administrable standard. There is nothing of that sort, and the inference is that these enactments do not create justiciable rights.

Tucker, 958 F.2d at 1417.

A court could properly review a claim that Congress did not conduct the census, or did not do so in good faith or intentionally reduced some group's representation. Judicial review of census methodology, however, is not authorized

by the Constitution. *City of Detroit*, 4 F. 3d at 1376. A court cannot provide a remedy for a census undercount which is unintentional and is "merely an accident of the census-taking process." *Tucker*, 958 F.2d at 1413. Judicial review is also improper because the claim of one State or city cannot be considered in isolation. The consequences for other States and cities must be weighed. *City of Detroit*, 4 F.3d at 1378.

The Sixth and Seventh Circuits rejected the same claim that the Second Circuit found to merit heightened scrutiny. The Sixth and Seventh Circuits reached the correct result. The conflict among the circuits should be resolved by this Court.

V.

THE COURT OF APPEALS ERRED WHEN IT IMPOSED A STANDARD OF REVIEW OTHER THAN ARBITRARY AND CAPRICIOUS.

If one assumes the Secretary is lawfully permitted the choice of utilizing statistical estimates for apportionment purposes, then it is clear that his decision is not subject to the heightened scrutiny imposed by the Second Circuit. The Administrative Procedures Act ("APA") sets out the required scope of review of agency decisions. The APA provides:

> . . . The reviewing court shall --
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity; . . .

5 U.S.C. § 706.

The district court reviewed the Secretary's decision in accordance with the mandate of the APA and determined that "the Secretary's decision not to adjust the 1990 census count was neither arbitrary nor capricious." *City of New York*, 822 F. Supp. at 929. On appeal, the plaintiffs argued that the refusal to adjust the census violated the apportionment clause of the Constitution and, therefore, the district court should have imposed a *de novo* standard of review.

The Court of Appeals rejected the plaintiffs' plea for *de novo* review. The court, however, did impose a heightened scrutiny, ruling that the agency's decision (1) had to further a legitimate governmental objective and (2) be essential for the achievement of that objective. The decision of the Court of Appeals was based on the premise that the Secretary's decision not to adjust the census involved violations of the Apportionment Clause and the Fourteenth Amendment.

The flaws in the Second Circuit's opinion, however, are that (1) this is not a case involving apportionment and (2) the agency decision does not involve State action. Because the case does not involve violation of constitutional rights, the scope of review is limited to whether the agency decision was arbitrary or capricious.

The Second Circuit relied on the disproportionment undercount of racial minorities to justify heightened scrutiny. *City of New York*, 34 F. 3d at 1129. The Second Circuit was wrong. It was wrong because the performance of the census involved no intentional conduct to reduce the count of minority residents. The law does not hold that an "official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Washington v. Davis*, 426 U.S. 229, 239 (1976) (emphasis in original). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). If there is proof that a discriminatory purpose was a motivating factor behind the official act in question, then "judicial deference is no longer justified." *Village of Arlington Heights*, 429 U.S. at 266.

In this case, there is no allegation that the Secretary intended to undercount minorities. It is also undisputed that the census cannot achieve an exact count of the nation's population. There is no basis upon which to support a heightened review of the Secretary's decision not adjust the census.

The Second Circuit attempted to avoid the requirement of intentional discrimination by analogizing this case to *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry*, 376 U.S. at 8; and *Reynolds v. Sims*, 377 U.S. 533 (1964). Each of these cases, however, dealt with apportionment or districting schemes within a particular State.

As recognized by the Second Circuit:

> There are, of course, differences between the present case and the *Wesberry/Reynolds v. Sims* line of cases because the present case focuses not on action by a state within its boundaries but rather on federal action that is nationwide in scope.

City of New York, 34 F.3d at 1129.

The *Wesberry* one-person-one-vote standard addresses the division of one fixed number by another fixed number. The population of the state is divided by the number of congressional representatives allowed to that state. This equation is easily solved and it readily provides a concrete number that can be used to measure the accuracy of the districting plan.

This case, however, concerns counting not solving an equation for an answer. There is a major conceptual difference between the two problems. In reviewing the Secretary's decision not to adjust the census, there is no equation and there is no resulting number to provide guidance. This case cannot be analyzed in the same manner as the apportionment cases.

The Seventh Circuit Court of Appeals, in *Tucker*, also rejected the claim that the refusal to adjust should be reviewed under the same standard as apportionment and voting rights cases:

> The plaintiffs cannot be serious in arguing that the refusal to adjust the headcount violates the Voting Rights Act. That Act

> provides remedies only against "any State or political subdivision" of a state. 42 U.S.C. § 1973; and see §§ 1973a to 1973dd-5. The Fourteenth Amendment is likewise limited to state action. The plaintiffs' invocation of these enactments is a throwaway.

Tucker, 958 F.2d at 1414.

The court also analyzed the plaintiffs' argument that failure to adjust the census violated the apportionment clause. The court again distinguished *Wesberry*, *Reynolds* and other cases relied on by the plaintiffs and found:

> The plaintiffs' main argument, however, is different from any we have mentioned. It is derived from a constitutional right neither to equal voting power nor to freedom from governmental discrimination, but to census accuracy.

Id. at 1415.

There is no constitutional right to census accuracy. Thus, the decision not to adjust the census did not violate the Constitution. The standard of review then must be whether the Census Bureau's decision not to adjust was arbitrary and capricious. The Court of Appeals erred in imposing a burden of heightened scrutiny.

CONCLUSION

The State of Oklahoma respectfully requests that the Second Circuit Court of Appeals' decision be reversed and

that the Secretary's decision not to adjust the 1990 census be upheld.

Respectfully submitted,

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November 9, 1995

APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clauses 1 and 3 of the United States Constitution provide:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> * * * * *
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration

> shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

2. Article I, Section 8, Clause 18 of the United States Constitution provides:

> **Section 8**. The Congress shall have Power
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Sections 2 and 5 of the Fourteenth Amendment to the United States Constitution provide:

> **Section 2**. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or

the members of the Legislature thereof, is denied to any one of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. 2 U.S.C. § 2a provides:

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each

State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall

be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

5. 13 U.S.C. § 141(a) and (b) provide:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a

decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

* * * * *

6. 13 U.S.C. § 195 provides:

Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

* * * * *

(10) (8) (8)

Nos. 94-1614, 94-1631 and 94-1985

Supreme Court, U.S.
FILED
NOV 8 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN, PETITIONER

v.

CITY OF NEW YORK, ET AL.

STATE OF OKLAHOMA, PETITIONER

v.

CITY OF NEW YORK, ET AL.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTION PRESENTED

Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment to the 1990 census violated the Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners, defendants below, are: United States Department of Commerce; Ronald H. Brown, Esq., As Secretary of the United States Department of Commerce; Everett Ehrlich, As Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; Harry Scarr, As Acting Director of Bureau of Census; William J. Clinton, As President of the United States; Dan Glickman, As Secretary of Agriculture; Donna E. Shalala, As Secretary of Health and Human Services; Henry Cisneros, As Secretary of Housing and Urban Development; Robert B. Reich, As Secretary of Labor; Federico Peña, As Secretary of Transportation; Richard W. Riley, As Secretary of Education. The State of Wisconsin and the State of Oklahoma, intervenor-defendants below, are also petitioners.

Respondents, plaintiffs below, are: City of New York; State of New York; City of Los Angeles; City of Chicago; City of Houston; Dade County, Florida; United States Conference of Mayors; National League of Cities; League of United Latin American Citizens; National Association for the Advancement of Colored People; Marcella Maxwell; Donald H. Elliott; John Mack; Olga Morales; Timothy W. Wright, III; Raymond G. Romero; Antonio Gonzales; Athalie Range; Jerry Alan Wood; Carolyn Sue Lopez; City of Atlanta, Georgia; Maynard Jackson, Individually, and as the Mayor of the City of Atlanta; Florida House of Representatives; Florida State Conference; Miguel A. De Grandy; Willye Dennis; Mario Diaz-Balart; Dr. Charles Evans; Rodolfo Garcia, Jr.; Bollowy L. "Bo" Johnson; Alfred J. Lawson, Jr.; Willis Logan, Jr.; Johnnie McMillan; Alzo J. Reddick; Peter Rudy Wallace; T.K. Wetherell; State of Texas; City of Phoenix, Arizona; State of New

Jersey; State of Florida; City of Cleveland, Ohio; City of Denver, Colorado; City of Inglewood, California; City of New Orleans, Louisiana; City of Oakland, California; City of Pasadena, California; City of Philadelphia, Pennsylvania; City of San Antonio, Texas; City of San Francisco, California; Broward County, Florida; State of Arizona; City of Baltimore, Maryland; City of Boston, Massachusetts; City of Long Beach, California; City of San Jose, California; Los Angeles County, California; San Bernadino County, California; District of Columbia; Navajo Nation; State of New Mexico; City of Tucson, Arizona; Council of Great City Schools. By virtue of Rule 12.6 of this Court, Donnald K. Anderson, As Clerk of the United States House of Representatives, a defendant below, is also a respondent in this Court.

The following were parties to the proceedings in the district court, but were not parties to the proceeding in the court of appeals: People of the State of California *ex rel*. Daniel E. Lungren, Attorney General; and County of Hudson, New Jersey.

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CITY OF NEW YORK, ET AL.

No. 94-1985

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-40)[1] is reported at 34 F.3d 1114. The opinions of the district court (Pet. App. 41-95, 96-120, 121-134) are reported at 822 F. Supp. 906, 739 F. Supp. 761, and 713 F. Supp. 48. The decision of the Secretary of Commerce (Pet. App. 135-415) is published at 56 Fed. Reg. 33,582.

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[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 94-1614.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1994. The petitions for rehearing filed by the States of Oklahoma and Wisconsin were denied on December 12, 1994, and January 4, 1995, respectively. Pet. App. 416-418, 419-421. The petition for a writ of certiorari in No. 94-1614 was filed by Wisconsin on April 3, 1995. The petition for a writ of certiorari in No. 94-1631 was filed by Oklahoma on April 4, 1995. On March 27, 1995, Justice Ginsburg extended the federal petitioners' time for filing a petition for a writ of certiorari to and including May 4, 1995. On April 25, 1995, Justice Ginsburg further extended the time for filing to and including June 3, 1995. The petition for a writ of certiorari in No. 94-1985 was filed by the federal petitioners on June 5, 1995 (a Monday). The three petitions were granted on September 27, 1995. J.A. 109-111. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See also notes 16 and 23, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clause 3, of the United States Constitution; the Fifth Amendment and Section 2 of the Fourteenth Amendment to the Constitution; 2 U.S.C. 2a; and 13 U.S.C. 141(a) and (b) are reproduced in relevant part at Pet. App. 422-425.

STATEMENT

A. Constitutional And Statutory Framework

The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives * * * shall be apportioned among the several States * * * according to their

respective Numbers" (the Apportionment Clause) and directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct" (the Census Clause). See also Amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

Pursuant to the Census Clause, Congress has provided in the Census Act that the decennial census shall be conducted by the Secretary of Commerce "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). Congress has, however, prescribed a strict timetable for the census. The population of the United States is to be determined as of April 1 of the census year. The "tabulation of total population by States" for the purpose of apportionment of Representatives is to be completed and reported to the President within nine months after the April 1 census date. 13 U.S.C. 141(b). Within a week of the beginning of the first Session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State * * * and the number of Representatives to which each State would be entitled" under the statutorily prescribed "equal proportions" formula for apportioning Representatives. 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-455 (1992). Within 15 days of receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section." 2 U.S.C. 2a(b). Following the 1990 decennial

census, the President transmitted the statement of the apportionment of Representatives to Congress on January 3, 1991, see 27 Weekly Comp. Pres. Doc. 6 (1991), and the Clerk then sent the required certificates to the Governors of the 50 States.

B. The 1990 Census

The 1990 decennial census was conducted in accordance with an elaborate, multi-staged procedure designed to locate and identify each housing unit in the country and to enumerate each person in those units by means of a system replete with rechecks and cross-checks.[2] The Census Bureau employed approximately 500,000 temporary workers, including 300,000 interviewers, in its efforts to obtain an accurate count of the population. Tr. 1743. Although those processes resulted in a very high rate of success, it is undisputed that many persons were not counted. The Secretary of Commerce originally estimated that the census enumeration had failed to count 2.1% of the population. Pet. App. 158. It was subsequently determined, however, that as a result of certain errors (including a computer processing error), that estimate significantly overstated the undercount; the Census Bureau represented at the trial in this case that the undercount was 1.6% of the population. *Id.* at 58 n.12; see Tr. 1786-1788; DX 21; see also Bureau of the Census,

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[2] That process included the development of comprehensive maps of each block in the United States, the identification of housing units on each block, test censuses and post-enumeration survey (PES) tests, the actual enumeration (including multiple contacts with each household that did not return a census questionnaire), and pre- and post-census review by state and local governments. See generally Pet. App. 319-332; *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1376 (6th Cir. 1993) ("the Census Bureau's efforts to conduct as accurate a census count as possible are extraordinary"), cert. denied, 114 S. Ct. 1217 (1994).

Department of Commerce, *Report of the Committee on Adjustment of Postcensal Estimates: Assessment of Accuracy of Adjusted Versus Unadjusted 1990 Census Base for Use in Intercensal Estimates* 15 (Aug. 7, 1992) (CAPE Report); 58 Fed. Reg. 70 (1993). That 1.6% undercount is approximately the same as the undercount in the 1980 census. Pet. App. 58 n.12.

It is undisputed that the undercount varied among population subgroups. The decision of the Secretary at issue in this case estimated that "Blacks appear to have been undercounted in the 1990 census by 4.8%, Hispanics by 5.2%, Asian-Pacific Islanders by 3.1%, and American Indians by 5.0%." Pet. App. 138-139. A differential undercount also exists among various other subgroups. For example, men are missed at a higher rate than women, the young are missed at a higher rate than the elderly, and renters are missed at a higher rate than homeowners. DX 1, at 457-458; Pet. App. 158.

C. Consideration Of An Adjustment To The 1990 Census

1. The problem of the overall undercount and differential undercounts among demographic groups led the Department of Commerce to consider a statistical adjustment to the 1980 decennial census. Ultimately, however, no adjustment was undertaken. That decision was challenged in a number of lawsuits, but none was successful. The action brought by the State of New York was not resolved until 1987. *Cuomo* v. *Baldrige*, 674 F. Supp. 1089, 1104 (S.D.N.Y. 1987).

In the same year that litigation regarding the 1980 census finally concluded, the Department of Commerce announced that no statistical adjustment would be made for the 1990 census. In the following year, respondents filed this suit, seeking to compel an adjustment to the 1990

census for all purposes for which the census is used, including the apportionment of Representatives among the States and the distribution of federal funds. Defendants included the President, the Secretary of Commerce, the Census Bureau and its Director, and the Clerk of the House of Representatives.[3]

In July 1989, prior to a hearing on respondents' request for a preliminary injunction, the parties entered into a stipulation under which defendants agreed to reconsider the adjustment question and to reach a decision by July 15, 1991. J.A. 61-67. Defendants also agreed that the Census Bureau would conduct a post-enumeration survey (PES) of at least 150,000 households in order to generate data on which a statistical adjustment could be based. J.A. 62. In accordance with the stipulation, the Secretary published proposed guidelines for public comment and ultimately adopted eight guidelines that he would consider in deciding whether to order an adjustment of the 1990 census totals. See 54 Fed. Reg. 51,002 (1989); 55 Fed. Reg. 9838, 9839-9842 (1990); Pet. App. 113-115.[4]

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[3] On February 8, 1989, counsel for the Clerk of the House of Representatives entered into a stipulation providing that the Clerk "neither objects nor consents to the relief requested by the plaintiffs in their complaint and takes no position with respect to the questions involved in this litigation." Stipulation Regarding Participation of Defendant Donnald K. Anderson at 1-2. The Clerk agreed to be bound by any judgment entered in the case and accordingly was "relieved of any obligation to answer the complaint or otherwise participate in this litigation." *Id.* at 2. We do not believe that injunctive relief was properly sought against the President. See *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2775-2776 (1992); *id.* at 2776-2777 (opinion of O'Connor, J.); *id.* at 2788-2790 (Scalia, J., concurring in part and concurring in the judgment).

[4] Those guidelines are reprinted in the district court's opinion of June 7, 1990, in which it considered respondents' contention that the guidelines were inconsistent with the Secretary's obligations under the

2. In July 1990, the Census Bureau conducted the PES, which involved an attempt to identify all individuals living in a selected sample of more than 168,000 housing units across the United States in order to determine whether those persons had been properly counted and located in the census. The Census Bureau placed persons in the PES in one of 1392 categories, called "post-strata," defined by five variables: age, sex, race and Hispanic/non-Hispanic ethnicity, geographic subdivision,[5] and home tenure (owner vs. renter). See Pet. App. 343 (giving examples of post-strata). The Bureau then estimated the rate at which individuals within each post-stratum had been accurately counted in the census. Data obtained from the PES were used to evaluate the accuracy of the original census and, through the use of a complex series of statistical and mathematical processes, to generate adjusted population estimates. See *id.* at 332-346.

a. In constructing the post-strata, the Census Bureau was required to make numerous choices and assumptions concerning how best to divide the population into groups that would have similar "capture probabilities" (*i.e.*, probabilities of being counted in the census). Reasonable alternatives to the 1392 post-strata would have produced different population estimates. To take one example, the PES divided the nation into geographic groups corresponding to the Census Bureau's census divisions (see Pet. App. 373) and assumed that the likelihood of being captured in the census was the same for persons within

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stipulation. See Pet. App. 113-115. The district court rejected that contention. *Id.* at 116-117.

[5] To define the geographic subdivision for a particular individual, the Bureau considered both the area of the country (*e.g.*, New England, Middle Atlantic) and the type of urban or rural area in which that individual resided. See Pet. App. 373-375.

each division who shared similar demographic characteristics. At the trial in this case, respondents' experts acknowledged that geographic groupings other than those used by the Census Bureau in conducting the PES might have been reasonable, and that those alternative groupings would have affected the outcome of the adjustment process. See Tr. 1440-1441 (testimony of Professor John W. Tukey); see also Tr. 1682-1683 (testimony of Steven Fienberg). Defendants' witness, Dr. Kenneth Wachter, also testified that alternative geographic groupings would have been equally reasonable, if not preferable, and would have produced different adjustment results. Tr. 2133-2142.

b. The Bureau compared the PES data with the census data to determine whether identified persons in the PES sample had been erroneously missed or counted by the census. That process was known as "matching." On some occasions, however, it was not possible to determine whether a particular person found in the PES had been recorded by the census, because incomplete census and PES forms made it impossible to determine whether PES records matched census records for some addresses. Pet. App. 169. In those instances, mathematical models were used to supply the missing data and then to "impute" a match status. *Id.* at 170. Experts disagreed over the level of error resulting from the imputation process. The Secretary's administrative decision declining to make an adjustment observed that "[t]he imputation scheme used for the PES is based on a series of assumptions that are mostly guesswork." *Ibid.*

c. By comparing the results of the PES with the results of the census, the Bureau developed an "adjustment factor" for each of the 1392 post-strata that estimated the percentage of the members of that post-stratum that were

undercounted or overcounted in the census,[6] as well as a "variance" for each of the adjustment factors.[7] The Bureau determined, however, that the initial or "raw" adjustment factor should not be used in making an adjustment because of the high level of "sampling error" (a type of error inherent in any attempt to extrapolate for the whole population based on a sample). See Pet. App. 345. Although the overall PES was an unusually large sample survey, the average post-stratum in the PES consisted of only about 300 people (377,000 persons in the PES divided by 1392 post-strata). See *ibid.*; DX 64, at 7; Tr. 2369-2370. In each post-stratum, moreover, only about 25 persons had been erroneously missed and about 15 persons erroneously counted in the original census. DX 64, at 7; Tr. 2369-2370. Any errors in those small numbers would produce significant changes in estimated undercounts or overcounts for the different post-strata. See DX 64, at 7; Tr. 2369-2370.

To deal with the problem of sampling error, the Bureau employed a "smoothing" procedure. In essence, smoothing sought to compensate for the relatively small number of persons in each post-stratum by combining data from many different post-strata, weighted on the basis of variables such as race or age. Pet. App. 219-220, 222. That attempt to correct for sampling error, however, introduced important new questions. The post-strata had been developed in the first place because they were believed to

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[6] The Secretary explained that "if the [estimated population based on the census and PES] for a particular post-stratum was 1,050,000 and the census count was 1,000,000, then the adjustment factor was 1.05." Pet. App. 344.

[7] The variance of an adjustment factor is an estimate of its random variation, see Pet. App. 223, calculated by squaring the standard error, see Tr. 2367.

represent groupings of persons with similar capture probabilities. See *id.* at 204-205. In combining post-strata in the smoothing process, the Bureau was required to make new assumptions as to which variables mattered and how those variables interacted to produce the undercount.

The Secretary's final decision discussed the smoothing process in considerable detail. See Pet. App. 219-226. One step of the smoothing process involved the calculation of a "flattened" estimate of the adjustment factor for each post-stratum. The "flattened" adjustment factor was derived by considering data from that post-stratum in conjunction with data from many other post-strata, through use of a statistical technique known as a linear regression. See *id.* at 222-223. To determine the "smoothed" adjustment factor, the Bureau calculated a "weighted" average of the raw and flattened adjustment factors, based upon the variances for the raw adjustment factors. If the variance for a particular adjustment factor was high, the smoothed factor would be closer to the flattened factor than to the raw factor; if the variance was low, the reverse would be true. *Id.* at 223.[8]

The smoothing procedure was subject to an additional complication. Due to the small size of each of the post-strata, the variances themselves (which were estimated from the sample data) were subject to substantial random variation. See Pet. App. 223. The Bureau therefore determined that the variances should also be smoothed, a process known as "pre-smoothing." *Ibid.*; see also Administrative Record (A.R.) 492 ("The Census Bureau * * * replaced the variances by a flatter, regression-based

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[8] As the Secretary explained, "[t]he smaller the random variation in a poststratum, the more the smoothed factor relies on the observed data and the less it relies on the regression estimate." Pet. App. 223.

set of approximations to them."). The smoothed variances were then used to smooth the adjustment factors (*i.e.*, to determine the weighted average of the raw and flattened adjustment factors for each post-stratum). See Pet. App. 223; see also *id.* at 377-415 (table of adjustment factors by post-stratum).

The effects of the smoothing procedure were significant. Dr. Ericksen and Dr. Tukey, who were members of the Special Advisory Panel (a group established pursuant to the stipulation, see J.A. 63-65), observed that the decision to "pre-smooth" the variances resulted in a substantial increase in the estimate of the net undercount, and in a 70% increase in the estimate of the differential undercount for minority residents. PX 142 (July 11, 1991, letter to Secretary Mosbacher) at 2. Dr. Wachter, who also was a member of the Special Advisory Panel, observed that "[t]he effect of deciding to use pre-smoothed rather than unsmoothed variances is to raise many of the adjustment factors by several percentage points and raise some by more than six percentage points. * * * These are huge changes for a decision of detail." A.R. 492; see Pet. App. 223-224. Indeed, a single highly technical decision to exclude certain data from the pre-smoothing model affected the process in such a manner as to cause a shift of a Representative as compared to the adjustment that would have occurred if those data had been included. Pet. App. 220.[9] The Secretary in his final decision expressed concern that "the statistical artifice of variance

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[9] The Bureau excluded from the pre-smoothing model variances from 28 post-strata on the extreme ends of the estimated adjustment factors, the so-called "outliers." Pet. App. 220. Respondents' expert acknowledged at trial that this exclusion was not required by any generally accepted statistical model. Tr. 851-854.

smoothing [wa]s making substantial differences in adjustment factors." *Id.* at 224.

d. Once final ("smoothed") adjustment factors were computed, the number of people in each post-stratum in a block was multiplied by the appropriate adjustment factor. Thus, if the adjustment factor for a post-stratum was 1.10, and a particular block was found in the enumeration to have 10 persons within that post-stratum, an adjustment would have required defendants to multiply that number by 1.10. Consequently, the block total would be adjusted upward by one person (10 x 1.1 = 11). This process would be repeated for every block in which members of that post-stratum had been counted in the census. Adjusted counts for larger areas—States, cities, counties, and congressional districts—were obtained by adding up the adjusted counts for the blocks within them. See Pet. App. 204-205, 346.

e. The adjustment process relied on the assumption that the undercount rate is constant throughout a post-stratum. For example, a post-stratum for white single male renters, aged 20-29, living in New York City "assumes" that the capture probability for a 29-year-old white male law firm associate living in a rented condominium in Manhattan is the same as the capture probability for a 20-year-old white male laborer who rents a room in Queens. If that "homogeneity" assumption were incorrect, the accuracy of adjusted counts for States, cities, counties, and congressional districts would be open to question. See generally Pet. App. 204-205. The importance of the homogeneity assumption was highlighted by Dr. Wachter, who explained that "[t]he homogeneity assumption, in a sense, is the whole ballgame." Tr. 2114.

The validity of the homogeneity assumption was therefore the subject of considerable concern and debate, and the Census Bureau expended substantial effort to address

it. Pet. App. 205-208. In a study known as "[P]roject P12" (*id.* at 205), the Bureau analyzed factors often correlated with undercounts and found, as the Secretary stated, that "these factors showed significant *heterogeneity* by state within post-stratum for well over 80% of the post-stratum groups." *Id.* at 207 (emphasis added). Dr. Wachter testified at trial that the Secretary's conclusions regarding the homogeneity assumption were supported by the detailed analysis of the Census Bureau in its Project P12 report, as well as by Dr. Wachter's independent analysis of Bureau data. Tr. 2154-2158.

D. The Secretary's Decision Not To Make An Adjustment

1. In making the final determination whether to adjust the 1990 census figures based on the PES, the Secretary of Commerce considered the views of a large and diverse array of persons both inside and outside the Department. He received advice from senior officials in the Economics and Statistics Administration (which includes the Census Bureau) and other senior advisors, as well as individual recommendations from each of the eight members of the Special Advisory Panel. Pet. App. 137, 139-140; see also *id.* at 258-319 (Secretary's summary and analysis of Special Advisory Panel recommendations). The Secretary also had access to a total of 21 studies that were performed in an effort to evaluate the PES, *id.* at 168, and he solicited and received extensive public comments on the question whether an adjustment should be made, *id.* at 137.

2. On July 15, 1991, the date established by the stipulation as the deadline for the adjustment decision,[10]

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[10] Guideline Six stated that, "[i]f sufficient data and analysis of the data are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust the 1990 census." Pet. App. 241. In his final decision, the Secretary noted that "because of the court imposed deadline for the decision, the analyses of

the Secretary issued his determination that the census headcount would not be statistically adjusted. Pet. App. 135-415. At the outset, the Secretary explained that the crucial question was not whether an adjustment would improve accuracy in terms of absolute numbers at the national level, but whether adjusted numbers would provide an improved account of the way the population is distributed among the States and their subdivisions. See *id.* at 141, 146-147, 161, 184. He noted that this focus on "distributive" rather than "numeric" accuracy follows from the constitutional purpose of the census, which is to apportion Representatives among the States, and from the other uses of the census, including intrastate electoral redistricting and the distribution of federal funds. See *id.* at 141, 184, 200-201. The Secretary also stated that, in accordance with the guidelines he had adopted to implement the parties' stipulation, the unadjusted figures would be regarded as the most accurate unless the adjusted numbers were shown to be more accurate. *Id.* at 184.[11]

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the data are far from complete." *Id.* at 243. He expressed "particular[] concern[] about problems in data quality and analysis that were revealed, or occurred, in the final weeks before the decision." *Ibid.*; see also, *e.g.*, *id.* at 144, 225 n.108, 244-246. The Secretary concluded, however, that "[n]otwithstanding my concerns about the effect the July 15, 1991, deadline had on research efforts, * * * sufficient data exist to permit me to decide whether to adjust the census." *Id.* at 247.

[11] Guideline One stated that "[t]he Census shall be considered the most accurate count of the population of the United States, at the national, State and local level, unless an adjusted count is shown to be more accurate." Pet. App. 151. The Secretary explained in his July 15, 1991, decision that "[t]he true population counts cannot be observed. However, classical statistics provides a standard way of approaching the required inference. In accordance with Guideline One, we take as a working (null) hypothesis that the actual enumerations in fact better characterize the true population. The adjusted counts are an alternative measure and the question is whether the available evidence

The Secretary concluded that a statistical adjustment would be likely to increase the overall numeric accuracy of the census at the national level. Pet. App. 184-185, 200. He further concluded, however, that the adjusted figures had not been shown to increase distributive accuracy, and that in fact "the evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration." *Id.* at 185. In support of that determination, the Secretary analyzed a variety of statistical disputes regarding the accuracy of the proposed adjustment, explaining that the adjustment process consisted of a series of statistical assumptions, each of which was susceptible to error. He also noted that the difficulty of his decision was increased by the "diversity of opinion among [his] advisors." *Id.* at 140. "The Special Advisory Panel split evenly as to whether there was convincing evidence that the adjusted counts were more accurate. There was also disagreement among the professionals in the Commerce Department, which includes the Economics and Statistics Administration and the Census Bureau." *Ibid.*

3. The Secretary analyzed at length the efforts made to estimate the relative accuracy of the adjusted and unadjusted numbers. Pet. App. 185-200. That inquiry focused largely on the Census Bureau's "loss function model," which the Bureau had developed to measure the "loss" from using the census as compared to the "loss" from using an adjusted count.[12] The Secretary concluded

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permits us to reject the hypothesis that the census better describes the true population." *Id.* at 184.

[12] The loss is the difference between each count and the "true population." Pet. App. 188-189. The "true population" is, of course, unknown. *Ibid.* Indeed, the purpose of an adjustment is to arrive at an estimate of the "true population." To deal with that problem, the Bureau attempted to create a hypothetical "true population" by tak-

that the loss function analysis involved so many uncertainties that its utility was questionable. *Id.* at 188-192. In the Secretary's view, however, the analysis tended to show that the adjusted figures were less accurate than the unadjusted count at every level from the state level down.

In this regard, the Secretary noted that the Bureau's initial loss function analysis had significantly overstated the distributive accuracy of the adjusted figures at the state and local levels, where the census is actually used for apportionment and funding. See Pet. App. 141. The Secretary pointed out that the original loss function analysis appeared seriously to underestimate the variances, or estimates of sampling error, in the adjusted data. *Id.* at 190-191. The Undercount Steering Committee (a panel of nine senior Census Bureau officials, see J.A. 71) had reported that the actual variances were between 1.7 and 3 times as great as the estimates used in conducting the loss function analysis. Pet. App. 190-191.[13] The Secretary concluded that if the variances were increased by a factor of 2, a figure at the low end of the Bureau's range, "the proportional shares of about 28 or 29 states would be worsened by an adjustment in terms of distributive accuracy." *Id.* at 191; see *id.* at 74. The record further showed that, even before that variance correction, an adjustment was estimated to worsen the distributive accuracy of 11 of the 23 metropolitan areas in

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ing the proposed adjusted figures and attempting to correct them for various "biases" or errors. See *id.* at 186-187. The census and the adjusted counts were then compared to the estimated "true population."

[13] The Undercount Steering Committee expressed that conclusion in an Addendum issued on June 27, 1991—less than three weeks before the Secretary was required by the stipulation to announce his decision for or against adjustment. See Pet. App. 190.

cities with 500,000 or more inhabitants, including the City of New York. *Id.* at 191.[14]

4. The Secretary also emphasized that even very small changes in the assumptions utilized in developing the adjustment methodology would shift Representatives from State to State. For example, "[o]ne expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods." Pet. App. 142; see also *id.* at 218. The Secretary noted as well the gravity of departing from the 200-year practice of relying upon unadjusted figures to apportion Representatives among the States. *Id.* at 138; see also *id.* at 248. Finally, the Secretary pointed out that "[d]ecisions that may be nearly equally defensible from a technical

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[14] Moreover, although the adjustment was in large part proposed to remedy the disproportionate undercount of minorities, the Secretary explained that the driving force of the proposed adjustment may not have been the undercount at all. He noted that "[o]ne would hope that the predominant determinant of the adjustment would be the number of people missed in the census," so that "areas with high miss rates get high adjustments." Pet. App. 173. His evaluation revealed, however, that the areas with the three highest omission rates in fact had very different adjustment rates. To a large extent, it turned out, the adjustment outcome reflected attempts to correct for *over*counting in certain areas and certain respects. *Ibid.* The Secretary's decision also suggested the lack of a firm basis for finding a direct correlation between a State's percentage of minority residents and how it fares under an adjustment, noting that the undercount rate for Montana was higher than that of New York. See *id.* at 194. Indeed, despite its relatively large proportion of minorities (see Bureau of the Census, Department of Commerce, *State and Metropolitan Area Data Book 1991*, at XIV-XV (4th ed. 1991)), New York's share of the population would actually decrease as a result of the proposed adjustment. See A.R., App. 10, Table 5.

standpoint may have very different outcomes which can be known in advance of the decisions," thereby creating the danger of actual or perceived "manipulation of the census for partisan gain." *Id.* at 236-237.

5. If Secretary Mosbacher had authorized the particular adjustment proposed for his consideration in July 1991,[15] and those adjusted figures had been made the basis for a reapportionment of Representatives among the States, the result would have been a loss of one Representative each for Wisconsin and Pennsylvania and a gain of one Representative each for California and Arizona. See Pet. App. 17, 250-251. Subsequently, however, the Census Bureau determined that its initial estimation of the net undercount had been substantially overstated. See page 4, *supra*. The Bureau then released corrected adjusted figures for each State. See CAPE Report, Att. 4. We have been informed by the Department of Commerce that if the method of equal proportions (see page 3, *supra*) is applied to the corrected adjusted census figures, Wisconsin would lose a Representative and California would gain one (as compared to the current

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[15] Guideline Three required that the adjusted figures be derived through "pre-specified" procedures. See Pet. App. 213-214, 215-217. As the Secretary explained in announcing the guidelines, "[t]his guideline specifie[d] that a set of procedures for generating proposed adjusted counts [would] be determined in advance of receiving the 1990 post-enumeration-survey estimates." 55 Fed. Reg. 9841 (1990). The Secretary's final decision made clear that the pre-specification requirement served as a safeguard against actual or perceived political manipulation, by requiring that choices regarding the details of the adjustment methodology would be made at a time when the effects of those choices upon the various States and localities could not yet be foreseen. See Pet. App. 217; see also *id.* at 83. As a result, although the Secretary recognized the existence of a variety of defensible adjustment methodologies, he was ultimately presented with a choice between the unadjusted census and a single set of adjusted figures.

apportionment), but the number of Representatives allotted to Arizona and Pennsylvania would remain unchanged.[16]

E. The District Court's Decision

Following the Secretary's decision, and over the government's objection, the district court permitted extensive discovery and set the case for trial.[17] The trial

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[16] Although California alone would gain a Representative from the proposed adjustment (as since corrected), California did not appeal from the judgment of the district court sustaining the Secretary's decision not to make an adjustment. See C.A. App. A387-A390 (notice of appeal). Several municipalities and individual voters in California did appeal. We have serious doubts, however, that municipalities have a right (either on their own behalf or in a parens patriae capacity) to challenge the apportionment of Representatives among the States, especially when the State itself is a party. Cf. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923). Similarly, although we may assume that individual residents could be accorded Article III standing to challenge the apportionment of Representatives among the States, there is a question whether they are proper parties to do so, or whether instead the State itself is the proper party to challenge the allocation of political power among the States under the structure prescribed by Article I of the Constitution. Compare *Nebraska* v. *Wyoming*, 115 S. Ct. 1933, 1944-1945 (1995). In *Montana* and *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992), for example, the State itself was a plaintiff (along with individual voters). See *Montana*, 503 U.S. at 458 (referring to "[t]he controversy between Montana and the Government"). Moreover, even if individual residents may initiate an action to challenge the apportionment of Representatives among the States, there is a further question whether they may continue such a challenge when their State, representing the interests of *all* its residents, has chosen to forgo an appeal, and thereby to accept the judgment of the district court that sustained the apportionment.

[17] The government argued in the district court, and continues to believe, that judicial review ought to have been confined to the administrative record that was before the Secretary at the time of his decision against adjustment. See, *e.g.*, *Florida Power & Light Co.* v.

lasted 13 days, involving numerous witnesses and thousands of pages of exhibits. At the conclusion of the trial, the court granted judgment for the governmental defendants, using the "arbitrary and capricious" standard of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A). See Pet. App. 65-66.[18] The court concluded that the Secretary's consideration of each of the guidelines adopted pursuant to the stipulation was reasonable. In particular, it found that the "Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits." *Id.* at 77-78. The district court also explored several of the underlying statistical controversies. Although the court stated in passing that it probably would have ordered an adjustment if it had been called upon to decide the issue de novo (*id.* at 89), it found no basis to set aside the Secretary's determination. The court stated, in particular, that the Secretary "was neither arbitrary nor capricious" in

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Lorion, 470 U.S. 729, 743-744 (1985); *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam); compare *Franklin*, 112 S. Ct. at 2771-2773, 2777-2779; *id.* at 2786 & n.22 (Stevens, J., concurring in part and concurring in the judgment). In our view, however, the evidence at trial confirmed the reasonableness of the Secretary's decision.

[18] At a prior stage of the litigation, the district court had concluded that "Article I, § 2 requires that the census be as accurate as practicable." Pet. App. 109 (brackets and internal quotation marks omitted). The court adhered to that conclusion in its final ruling, while making clear that its application of that standard would reflect deference to the Secretary's resolution of disputed technical and policy questions. See *id.* at 68 (test is "whether the Secretary's decision was arbitrary and capricious in light of the requirement that the decision provide the most accurate census practicable").

concluding that the superior distributive accuracy of the adjusted figures had not been established. *Id.* at 77.

F. The Court Of Appeals' Decision

On appeal to the Second Circuit, respondents did not contest the district court's determination that the Secretary's decision against adjustment was not arbitrary or capricious. They argued instead that the district court should have analyzed the adjustment issue de novo because the outcome of the decision affected the allocation of Representatives and thus raised constitutional concerns. The court of appeals rejected the argument for de novo review. Pet. App. 23, 34. It nevertheless reversed the judgment of the district court, on a rationale not advanced by respondents. It held that "both the nature of the right and the nature of the affected classes are factors that traditionally require that the government's action be given heightened scrutiny: the right to have one's vote counted equally is fundamental and constitutionally protected, and the unadjusted census undercount disproportionately disadvantages certain identifiable minority groups." *Id.* at 33. The court noted that in "one person-one vote" challenges to intrastate districting plans, a court must first determine "whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Id.* at 36-37 (quoting *Karcher* v. *Daggett*, 462 U.S. 725, 730 (1983)). In that setting, if a court determines that a good-faith effort has not been made, "the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Id.* at 37 (quoting *Karcher*, 462 U.S. at 731).

Applying that analysis here, the court of appeals concluded that "plaintiffs carried their burden of proving

that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable." Pet. App. 38. The court reached that conclusion by focusing on "the Secretary's acknowledgement" that use of the adjusted population estimates likely would increase the overall *numeric* accuracy of the census at the national level and would reduce the disproportionate undercount of minorities. *Ibid.* The court stated that the Secretary "gave other factors priority over achievement of greater accuracy" at the national level by, *inter alia*, "valu[ing] 'distributive accuracy' over numerical accuracy." *Ibid.* It also expressed the view that the Secretary's determination that an adjustment should not be made unless it would result in *greater* distributive accuracy implied that he did not make the requisite good-faith effort in light of the improved count of the total national population and the improved absolute count of minorities under the adjusted figures. *Ibid.*; see also *id.* at 38-39.[19] The court of appeals concluded that the Secretary's decision against adjustment was "subject to scrutiny not under an arbitrary-and-capricious standard of review but rather under the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity." *Id.* at 39-40. It therefore vacated the judgment of the district court and remanded for further proceedings to determine whether the Secretary's deci-

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[19] The court of appeals also noted the Secretary's concern that an adjustment that did not clearly provide a more accurate account of the distribution of the population would introduce fears of political manipulation. The court stated that that concern reflected a belief that "eliminating the possibility of manipulation of statistical surveys in the future was more important than using the admittedly unmanipulated 1990 PES to achieve a more accurate overall count." Pet. App. 38.

sion "(a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective." *Id.* at 40.

Judge Timbers dissented. He expressed agreement with the decision and reasoning of the district court and noted that the majority's holding was in conflict with the decisions of two other courts of appeals. Pet. App. 40 (citing *City of Detroit* v. *Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994); *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992)).

SUMMARY OF ARGUMENT

A. In light of the Census Bureau's extraordinary efforts to conduct an accurate enumeration, and its success in counting 98.4% of the population, respondents bear a heavy burden in contending that the Constitution mandated a statistical adjustment to the 1990 census figures. In fact, the Secretary's decision against adjustment was fully consistent with applicable constitutional requirements. The Secretary's emphasis on distributive rather than numeric accuracy, and his determination that the unadjusted figures would be considered the most accurate absent a contrary showing, were "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2777 (1992). The focus on distributive accuracy follows necessarily from the constitutional purpose of the census, which is to determine the apportionment of Representatives among the States. And it was surely permissible for the Secretary to require proof that the adjusted population estimates were more accurate before abandoning the 200-year practice of using unadjusted figures.

Based on an exhaustive analysis, the Secretary concluded that the available evidence "tends to support the superior distributive accuracy of the actual enumeration." Pet. App. 185. Any review of the Secretary's analysis of disputed technical issues must be conducted under a highly deferential standard. The adjustment process involved a host of complex assumptions that were susceptible to error, and the use of plausible alternative assumptions would have affected the apportionment of seats in the House of Representatives. Absent unequivocal evidence that an adjustment would have improved the distributive accuracy of the census, there is no constitutional basis upon which a court could set aside the Secretary's determination that no adjustment was warranted.

B. The district court held that the Secretary "was neither arbitrary nor capricious" in concluding that the superior accuracy of the adjusted figures had not been demonstrated, Pet. App. 77, and respondents did not challenge that holding on appeal. The court of appeals concluded, however, that the Secretary's adjustment decision was subject to review under a heightened standard adapted from this Court's intrastate redistricting decisions. The court reasoned, in particular, that "plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable." *Id.* at 38. That statement is without basis. The Secretary's acknowledgment that an adjustment would have increased *numeric* accuracy does not evidence a lack of effort to apportion Representatives accurately among the States, since only distributive accuracy is relevant to the apportionment process. Nor did the district court find, implicitly or explicitly, that a good-faith effort had not been made.

The court of appeals also erred in suggesting that equal protection principles required heightened scrutiny of the Secretary's decision because the census disproportionately undercounted racial minorities. It is well established that an equal protection violation based upon racial discrimination requires proof of a discriminatory *purpose*. Respondents have not alleged, and neither the court of appeals nor the district court found, that either the Secretary or other federal officials acted for the purpose of reducing the electoral power of (or otherwise disadvantaging) minority residents. Accordingly, review of the Secretary's decision under a heightened standard is not warranted.

ARGUMENT

THE SECRETARY'S DECISION NOT TO UNDERTAKE A STATISTICAL ADJUSTMENT OF THE 1990 CENSUS WAS FULLY CONSISTENT WITH THE CONSTITUTION

In considering whether to make a statistical adjustment of the population figures resulting from the 1990 census, the Secretary of Commerce received sharply conflicting recommendations from independent advisors and from subordinates within his own Department. The question for this Court is not whether, on balance, the Secretary made the appropriate determination as a matter of statistics or policy, but whether his decision not to make an adjustment was within the range of constitutionally permissible options. As we demonstrate below, it was.

Resolution of the technical and policy disputes bearing on the adjustment determination is substantially entrusted to the Secretary's expert judgment and discretion, and judicial review must reflect appropriate deference to his decision. Such deference is mandated by generally applicable principles of administrative law. It is required

as well by the broad delegation of authority expressed in the Constitution itself, which provides that the census shall be conducted "in such Manner as [Congress] shall by Law direct," Art. I, § 2, Cl. 3, and in the Census Act, which authorizes the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. 141(a). And it is required by the compelling interest in the finality of the President's apportionment of Representatives among the States in January 1991, which was based on the unadjusted census data.

Secretary Mosbacher's July 15, 1991, decision against adjustment of the 1990 census figures was reasonable and consistent with applicable constitutional standards. We agree with the court of appeals that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census. See Pet. App. 23-25; 13 U.S.C. 141 (decennial census), 181 (intercensal population data). The remainder of the court of appeals' analysis, however, reflects a fundamental misunderstanding both of the bases for the Secretary's decision and of the governing constitutional principles.

A. The Secretary's Decision Was Consistent With The Text, History, And Purpose Of The Constitution

1. The Census Clause of the Constitution provides that the "actual Enumeration" of the population shall be conducted "in such Manner as [Congress] shall by Law direct." Art. I, § 2, Cl. 3. That text affords Congress great discretion to choose from among the broad range of possible ways to conduct the census the particular "Manner" it believes to be the most appropriate. Congress in the Census Act has delegated to the Secretry broad authority to assess and weigh myriad factors, such as feasibility, efficiency, resource allocation, public partici-

pation, state and local support, various standards of accuracy, and the degree of confidence in the results. In particular, nothing in the Census Clause prescribes whether (or to what extent) Congress or the Secretary should provide for face-to-face interviews, mailed questionnaires, follow-up visits, or statistical sampling, so long as the process is reasonably calculated to produce state population totals having a sufficient degree of accuracy to constitute an "actual Enumeration" on which to base an apportionment of Representatives among the several States "according to their respective Numbers," Art. I, § 2, Cl. 3. Compare *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 463 (1992) ("The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course.").

There can be no doubt that the manner in which the Census Bureau conducted the 1990 decennial census satisfied that fundamental standard. The Census Bureau first sought to identify every housing unit in the country and then mailed or delivered a questionnaire to every unit. See Pet. App. 323-324. "The Census Bureau followed up every housing unit for which a questionnaire was not returned," *id.* at 327; its nonresponse follow-up policy required Bureau enumerators "to make up to six attempts to contact a household member and complete a census questionnaire," *id.* at 328. The Bureau also developed special procedures directed at individuals—such as residents of group quarters, transients, military personnel, homeless persons found at street and shelter locations, and parolees and probationers—who the Census Bureau believed were particularly likely to be missed. See *id.* at 326, 330-331. The Bureau's "Were You Counted?" campaign provided individuals who believed that they had been missed with an additional opportunity for

inclusion in the census. *Id.* at 330. Finally, units of local government were permitted to challenge the housing unit or group quarters count for any block. *Id.* at 332.[20] The Census Bureau has concluded that that elaborate process counted 98.4% of the nation's population, which was roughly equal to the percentage counted in 1980 and exceeded the percentage counted in every census before 1980. See CAPE Report 4.

Especially when measured against historical practice and experience, the "headcount" in 1990 was well within the range of accuracy necessary to fulfill Congress's constitutional responsibility to make an actual enumeration of the population. Compare *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2777-2778 (1992) (noting importance of historical experience); *id.* at 2785 (Stevens, J., concurring in part and concurring in the judgment) ("The 'usual residence' policy that has guided the census since 1790 provides a further standard by which to evaluate the Secretary's exercise of discretion."); *Montana*, 503 U.S. at 465-466. Respondents accordingly assume a heavy burden in attempting to demonstrate that the Census Clause nevertheless imposed a judicially enforceable duty on the Secretary to *revise* that constitutionally acceptable enumeration—*e.g.*, by means of a statistical adjustment. Respondents have wholly failed to carry that burden.

2. The Secretary's decision not to undertake an adjustment of the 1990 census figures rested primarily on three determinations. First, the Secretary concluded that distributive rather than total numeric accuracy should be of paramount importance in his decision whether to make a

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[20] Each of the country's 51 largest cities challenged at least some blocks, and eight cities challenged more than 2000 blocks. Pet. App. 332.

statistical adjustment. Second, the Secretary determined that, in making his decision, the unadjusted census figures would "be considered the most accurate count of the population of the United States, at the national, State, and local level, unless an adjusted count is shown to be more accurate." Pet. App. 151. Finally, the Secretary concluded that the adjusted figures had not been shown to improve distributive accuracy and that adjustment was therefore not warranted.[21]

The first two determinations are matters of policy that a court may review to the extent of determining whether they are "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S. Ct. at 2777. The third is an exercise of technical judgment that is properly reviewable, if at all, only under a deferential "rational basis" or "arbitrary and capricious" standard.[22] Each of the determinations at issue easily withstands judicial scrutiny.

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[21] Pursuant to the stipulation and guidelines, see page 6, *supra*, the Secretary's 1991 decision also discussed in detail several other factors bearing on the decision not to adjust. We believe that the Secretary's consideration of those factors was "consonant with, though not dictated by, the text and history of the Constitution." *Franklin*, 112 S. Ct. at 2778. However, disputes concerning the propriety of those aspects of the Secretary's decision are not central to this case for present purposes. Although the Secretary believed that such factors as encouraging participation in future censuses and the fear of actual or perceived political manipulation lent further support to the decision against adjustment, he stated unequivocally that the adjusted figures had not been shown to improve the accuracy of the census in the relevant (*i.e.*, distributive) sense. Moreover, such factors as concern about actual or perceived political manipulation are not irrelevant to the overall, long-term accuracy of the census. Cf. *Baldrige* v. *Shapiro*, 455 U.S. 345, 353-354 & n.8, 361 & n.17 (1982).

[22] Two courts of appeals have concluded, in rejecting constitutional challenges to the Secretary's decision against adjustment,

a. The constitutional purpose of the census is to determine the apportionment of Representatives among the States, U.S. Const. Art. I, § 2, Cl. 3, based on their "respective numbers, counting the whole number of persons in each State." Amend. XIV, § 2.[23] Even a

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that the Apportionment Clause "does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology" because such a lawsuit "invokes no judicially administrable standards." *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992); accord *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1375-1378 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994). We shall assume for present purposes, however, that the Secretary's decision is reviewable under a "rational basis" or "arbitrary and capricious" standard. Cf. *Franklin*, 112 S. Ct. at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment).

[23] As explained above, see pages 18-19, *supra*, use of the particular adjustment proposed for Secretary Mosbacher's consideration would have resulted in a loss of one Representative each for Wisconsin and Pennsylvania and a gain of one each for California and Arizona, while use of the "corrected" adjusted figures would have resulted in a transfer of one Representative from Wisconsin to California. The large majority of the plaintiffs in this case, however, are States other than California and Arizona, or municipalities or residents outside of California and Arizona. Although many of those plaintiffs may have suffered injury-in-fact due to the impact of the Secretary's decision upon the distribution of federal funds, cf. *City of Detroit*, 4 F.3d at 1374-1375, there is a substantial question whether plaintiffs outside Arizona and California may contest the allocation of Representatives among the States or invoke a heightened standard of review based upon the purported effect of the Secretary's decision upon the right to vote. See *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 720 (1990) ("Ordinarily, of course, a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (internal quotation marks omitted); cf. *Franklin*, 112 S. Ct. at 2776 (plurality opinion) (Massachusetts lacked standing to challenge accuracy of census data absent allegation that it would have been allocated an additional Representative if different data had been used). Nor does the Administrative Procedure Act fur-

dramatic undercounting of the total population would not be inconsistent with the goal of fair apportionment if each State's share was accurately determined. Cf. *Karcher* v. *Daggett*, 462 U.S. 725, 736 (1983) ("the existence of a one-percent undercount would be irrelevant to population deviations among districts if the undercount were distributed evenly among districts"). Conversely, a precise determination of the nation's total population as a result of a statistical adjustment would not improve the apportionment process if the States' respective shares were inaccurately estimated under the adjustment. Thus, the Secretary's focus on distributive rather than numeric accuracy was "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S. Ct. at 2777; accord Pet. App. 77-78 (district court's decision). Respondents acknowledge (Br. in Opp. 39) that "distributive accuracy is the object of adjustment." See also Resp. C.A. Reply Br. 14 n.4 (stating that respondents "agree (as do, for that matter, all experts on either side of the adjustment question) that it is distributive accuracy that is of paramount importance for the constitutional and legal purposes for which the census is conducted").

b. The Secretary's determination to resolve the issue of an adjustment to the 1990 census by regarding the unadjusted figures as the most accurate unless a contrary showing was made is also a judgment "consonant with, though not dictated by, the text and history of the Constitution." *Franklin*, 112 S. Ct. at 2778. Because unadjusted headcounts had been used for 200 years, the Constitution surely did not bar the Secretary from adopting a working hypothesis that unadjusted figures

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nish a statutory basis for challenging the decennial census. *Franklin*, 112 S. Ct. at 2773-2776.

derived from the 1990 census would be treated as the most accurate unless alternative numbers were shown to be better. See pages 28-29, *supra*. Nor could "the constitutional goal of equal representation" among the States, *Franklin*, 112 S. Ct. at 2777, plausibly be thought to require the Secretary to use adjusted figures that he had not found to be more accurate than the unadjusted numbers in achieving that goal. In any event, the Secretary did not simply determine that proponents of adjustment had failed to prove the greater distributive accuracy of adjusted figures; he affirmatively concluded that "the evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration." Pet. App. 185.[24]

c. As Census Bureau Director Bryant observed in her recommendation to the Secretary in favor of an

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[24] The court of appeals suggested in passing that the Secretary regarded the adjusted and unadjusted numbers as equally accurate, see Pet. App. 38, and stated that the adjusted figures would improve accuracy for the areas in which up to two-thirds of the population resided, see *id.* at 39. Those characterizations of the record reflect a basic misreading of the Secretary's decision and the evidence at trial. The two-thirds figure was an *original* estimate provided by the Census Bureau using its "loss function model." The Secretary's decision explained in considerable detail that the loss function model had failed to take into account variances that the Undercount Steering Committee subsequently reported to be significantly understated. See *id.* at 185-192. As the district court explained, "when the Secretary employed a statistical variance toward the low end of the acceptable range envisioned by the [Undercount Steering Committee], he found that the proportional shares of 28 or 29 states would be worsened by adjustment." *Id.* at 74. As noted above, subsequent research by the Census Bureau and further evidence presented at trial demonstrated that the original loss function analysis substantially overstated the accuracy of the adjusted data. See page 16, *supra*. The court of appeals' reliance on data that the Secretary had specifically corrected underscores the error of its analysis.

adjustment, "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." J.A. 73. The Secretary engaged in exhaustive analysis of the pertinent evidence, however, and his resolution of disputed technical questions can be reviewed only under an extremely deferential standard. See page 29 and note 22, *supra*. There is, in particular, no basis for respondents' contention in the court of appeals that the central statistical issue in this case—whether use of the adjusted figures would have improved the distributive accuracy of the census—should have been resolved by the district court de novo on the ground that the case involves a constitutional claim.

De novo review of the expert agency's technical judgments would be especially inappropriate in the present context, where the pertinent constitutional and statutory provisions vest broad discretion in the political Branches. See *Baldrige* v. *Shapiro*, 455 U.S. 345, 361 (1982). The Census Clause provides that the census shall be conducted "in such Manner as [Congress] shall by Law direct." Art. I, § 2, Cl. 3. The Census Act similarly contains a broad delegation of authority to the Executive Branch, directing the Secretary to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a). The governing constitutional and statutory provisions therefore counsel the courts to exercise particular caution in reviewing the Secretary's discretionary determinations regarding the conduct of the census.

Moreover, although issues pertaining to the accuracy of the census implicate constitutional values, resolution of the statistical dispute in this case does not involve the interpretation of constitutional text. Rather, it involves an exercise of technical expertise that lies uniquely within the competence of the Executive Branch officials to

whom Congress has entrusted the extraordinarily complex task of conducting the decennial census. As this Court has repeatedly recognized, where "analysis of the relevant documents requires a high level of technical expertise, [courts] must defer to the informed discretion of the responsible federal agencies." *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 377-378 (1989) (internal quotation marks omitted); see also *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2387 (1994); *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976); *International Fabricare Institute* v. *EPA*, 972 F.2d 384, 400 (D.C. Cir. 1992) ("As we are not scientists and must defer to the Agency's judgments on matters within its technical competence, our task is to assure that they be reasoned, not that they be right."). That respondents' attack on the Secretary's decision is framed as a constitutional challenge does not detract from the respect for institutional competence that underlies the rule of deference to an expert agency's technical judgments.

Finally, de novo resolution by the district courts of the question whether an adjustment would increase distributive accuracy would create the possibility of inconsistent factual findings by courts in different jurisdictions —each reviewable on appeal only under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-576 (1985). Where a variety of reasonable alternatives were presented for the Secretary's consideration,[25] no definitive resolution of the conflict

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[25] As explained above, see note 15, *supra*, the Secretary was ultimately confronted, due to the pre-specification requirement, with a choice between the unadjusted census and a single set of adjusted

would be possible under ordinary principles of appellate review. And because the constitutional purpose of the census is to determine the manner in which a fixed number of Representatives should be apportioned among the States, the Secretary could not utilize adjusted figures in some regions of the country and unadjusted figures in others. See *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1378 (6th Cir. 1993) ("Plaintiffs' request for a statistical adjustment for Michigan alone cannot be considered in isolation. It would be impractical for this Court to order ([and] the Secretary to do) such an adjustment without considering the consequences for the other states and other cities."), cert. denied, 114 S. Ct. 1217 (1994).[26]

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figures. The district court framed the question before it as whether the Secretary had made a permissible choice between those two alternatives, and respondents have not contended that some other set of numbers should have been used. If respondents (or some other plaintiffs) had made such an argument, however, and if the role of the district court were to resolve pertinent statistical disputes de novo, there would be no barrier to courts in different jurisdictions determining that each of several adjustment methodologies would have maximized distributive accuracy.

[26] Nor would it be a satisfactory solution for conflicting district court determinations regarding the choice of census figures that would maximize distributive accuracy to be reviewed de novo by the courts of appeals, and ultimately by this Court. To the institutional limitations applicable to all federal courts would be added the disadvantages associated with requiring appellate judges to function as triers of fact. See *Anderson*, 470 U.S. at 574-575. Those disadvantages are particularly severe where resolution of factual disputes requires credibility determinations. *Id.* at 575. Where (as here) expert testimony is presented on each side of the adjustment question, a court's attempt to determine de novo whether adjustment would enhance distributive accuracy would necessarily involve an assessment of the credibility of the competing experts.

d. The district court held that the Secretary "was neither arbitrary nor capricious" in concluding that the superior distributive accuracy of the adjusted figures had not been demonstrated. Pet. App. 77. That holding was not contested on appeal, and it was clearly correct. As explained above, the formulation and evaluation of the proposed adjustment involved a series of complex processes and assumptions in a highly technical area at the frontier of generally accepted statistical science. In the Secretary's view, however, the analysis tended to show that the adjusted figures were less accurate than the unadjusted count at every level from the state level down. See pages 15-17, *supra*.

There were, moreover, substantial uncertainties in the record that weighed against a determination that the particular adjustment under consideration was distinctly meritorious and superior to the unadjusted figures. Thus, the Secretary noted that "[o]ne expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods." Pet. App. 142; see also *id.* at 218.[27] The evidence at trial confirmed that the use of reasonable alternative assumptions in the

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[27] The Secretary was referring to Dr. Wachter's study, which considered five alternative adjustment calculations. See Pet. App. 142, 218, 303-304. Dr. Wachter compared adjustments using the smoothed adjustment estimates with the raw estimates. *Id.* at 218. Recognizing the problems inherent in the imputation of persons who could not be matched with census data, Dr. Wachter also substituted two alternative assumptions for dealing with unmatched persons. *Ibid.* Dr. Wachter's fifth estimate employed adjustment factors formulated on the basis of data within each State rather than the multi-State aggregations used in the post-strata. *Ibid.* Each alternative approach produced a different apportionment result. *Id.* at 142, 218, 304.

adjustment process could have altered the apportionment of Representatives. For example, both plaintiffs' and defendants' experts recognized that alternative geographic groupings could have been used in formulating post-strata and that those alternatives would have produced different adjusted population figures. See pages 7-8, *supra*. Moreover, experts on both sides recognized that the decision to "pre-smooth" the variances, and then to "smooth" the adjustment factors, significantly affected the adjustment outcome. See pages 9-11, *supra*.[28]

The uncertainties discussed at length in the Secretary's decision were underscored by the trial testimony of Dr. Robert Fay, a Senior Mathematical Statistician at the Census Bureau and one of the members of the Undercount Steering Committee who had initially supported adjustment. Dr. Fay testified that there had been a great deal of uncertainty at the time of the July 15, 1991, decision surrounding the original estimated variances used in the loss function model. Because of that uncertainty, Dr. Fay, on behalf of the Undercount Steering Committee, attempted to estimate the size of the variances based on judgment, not calculations. Tr. 1906.

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[28] Dr. David Freedman, defendants' smoothing expert, testified that the dramatic effects of smoothing militated against an adjustment decision because the assumptions in the smoothing model had not been validated. Tr. 2385-2386. Similarly, Dr. Wachter stated that the substantial effects of pre-smoothing were especially troubling because "[p]re-smoothing the variances that go into smoothing the adjustment factors is at three removes from the data. It incorporates little, if any, further empirical information. It depends entirely on a set of further assumptions." A.R. 495; see Pet. App. 224. Indeed, because of the serious concerns with the smoothing model, the Census Bureau abandoned the smoothing process altogether in devising a proposal for a possible statistical adjustment for use in the intercensal estimates program. See 58 Fed. Reg. 72-73 (1993).

On that basis, Dr. Fay had "roughly guessed" that there appeared to be enough of a "margin of safety" to support a recommendation in favor of adjustment. Tr. 1907.

After the July 15, 1991, decision, Dr. Fay conducted additional research and determined that the original estimates failed to account for all the sources of variance in the smoothing model. When those previously unaccounted-for variances were taken into account, Dr. Fay determined that the initial variance estimates were understated by approximately a factor of 2. Tr. 1914-1917.[28] That result, Dr. Fay explained, represents a significant increase in the uncertainty of the PES estimates. Tr. 1920. As a result of this work, Dr. Fay no longer advocated the adjustment recommended by the Committee and sought by respondents. Tr. 1920-1921.

In sum, the adjustment process and the loss function analysis designed to evaluate that process were based on technical assumptions and hypotheses that were subject to substantial uncertainty. The record demonstrated that had several of those assumptions been altered in a manner that would itself have been reasonable, the apportionment of Representatives would have been different from the one resulting from the particular adjustment submitted to the Secretary. For that reason, and in the absence of evidence demonstrating that even that particular adjustment proposal would have improved the distributive accuracy of the census, the Secretary's decision not to undertake the adjustment was clearly permitted under the Constitution. That is especially so in light of the need for the Secretary to make a decision by July 15, 1991, the deadline to which respondents stipulated in the district court and which

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[28] Two of plaintiffs' experts, Dr. Wolter and Dr. Tukey, testified that such results would have caused them to review their recommendations. Tr. 726-727, 1420.

they did not challenge in the court of appeals. As that deadline approached, the Secretary concluded that the state of the administrative record and the various expert evaluations of it were not yet sufficiently settled to permit him to make a decision in favor of adjustment with the degree of confidence he believed was appropriate for such a significant departure from historical practice. See Pet. App. 140-141, 144.

B. The Court Of Appeals Erred In Holding That The Secretary's Decision Should Be Subject To Heightened Scrutiny And That Respondents Established A Prima Facie Case Of A Constitutional Violation

The court of appeals analogized the Secretary's 1991 decision to a State's decision to create congressional or state legislative districts of unequal size. Under this Court's precedents, parties challenging a State's districting decisions first bear the burden of proving that differences between the populations of individual districts within a State are "not the product of a good-faith effort to achieve population equality." *Karcher*, 462 U.S. at 740; see *id.* at 730-731 (discussing burden of proof). If the plaintiffs are able to make that showing, "the burden shift[s] to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective." *Id.* at 740.

In the present case, the court of appeals concluded that "plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable," and that "the burden thus shifted to the Secretary to justify his decision not to adjust the census in a way that the [district] court found would for most purposes be more accurate and would lessen the disproportionate counting of minorities." Pet. App. 39.

The court of appeals thus treated the Secretary's decision as suspect on the basis of (a) the Secretary's acknowledgment that an adjustment would probably improve total numeric accuracy at the national level, (b) a purported district court finding that the adjusted figures "would for most purposes be more accurate," *ibid.*, and (c) the uncontested fact that the undercount of racial minorities was greater than the undercount of nonminority residents. The court of appeals' attempt to apply the *Karcher* analysis in this quite different setting does not withstand scrutiny.[30]

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[30] Any effort to apply a *Karcher*-type analysis to the Executive Branch's conduct of the census and certification of state population figures would have to take account of certain significant differences between the census and apportionment process and a State's districting decisions. First, an attempt to ensure that congressional districts in different States are precisely equal in population "is constrained by three requirements. The number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines." *Montana*, 503 U.S. at 447-448. Thus, notwithstanding the federal government's efforts to achieve population equality "as nearly as is practicable," *Karcher*, 462 U.S. at 730, disparities between districts in different States are likely to be of a magnitude that would be unacceptable in the context of state districting policy. Second, because of the technical complexity of the enumeration process and the multitude of discretionary determinations that it entails, a reviewing court should be especially cognizant of the difference between the question whether the agency has in fact maximized population equality and the question whether it has made a *good-faith effort* to do so. See pages 44-45, *infra*. Finally, the sweeping constitutional grant of authority to Congress to conduct the census "in such manner as they shall by Law direct," Art. I, § 2, Cl. 3, suggests that a broader range of legitimate governmental objectives may be available to justify use of census figures that do not maximize population equality than would be true of decisions made in the state districting context.

1. As an initial matter, the extraordinary effort expended by the Census Bureau in conducting the 1990 decennial census, and the success of the Bureau in counting 98.4% of the nation's population, are sufficient in themselves to refute any suggestion that the headcount totals respondents challenge were "not the product of a good-faith effort to achieve population equality." *Karcher*, 462 U.S. at 740. As we have explained above (see pages 27-28, *supra*), the headcount was well within the range of accuracy necessary to fulfill Congress's constitutional responsibility to make an actual enumeration of the population for apportionment purposes. For that reason alone, even if we assume *arguendo* that the *Karcher* framework should be applied by analogy here, respondents have failed to carry their threshold burden under that framework.

2. In the state redistricting cases, where a given population is to be divided into a fixed number of districts, courts can readily "decree equality." *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992). In that setting, if significant differences between the sizes of individual districts are conceded to exist, a court can confidently conclude, not simply that the State has failed to achieve population equality, but that it has failed to make a good-faith effort to do so.

This case, by contrast, involves the antecedent task of determining the population, a complex inquiry circumscribed by limitations in resources and statistical science. That task involves numerous technical and policy decisions as to which reasonable alternatives are available.[31]

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[31] Each choice among such alternatives would in turn invite litigation under the court of appeals' decision. In addition to the several lawsuits seeking to compel a statistical adjustment to the census,

numerous suits have been filed challenging a host of other census-related decisions. See, *e.g.*, *Franklin* v. *Massachusetts*, *supra* (challenging Census Bureau's method of allocating certain overseas federal employees to particular States); *National Law Center on Homelessness and Poverty* v. *Brown*, appeal pending, No. 94-5312 (D.C. Cir.) (argued Oct. 6, 1995) (challenging Census Bureau's procedures for locating and enumerating homeless persons); *Carey* v. *Klutznick*, 637 F.2d 834 (2d Cir. 1980) (seeking, in addition to a statistical adjustment to 1980 census, an order requiring the Census Bureau to process certain forms and to compare Census Bureau records of New York City residents with a computerized list of 1.2 million persons in New York City eligible for Medicaid); *Borough of Bethel Park* v. *Stans*, 449 F.2d 575 (3d Cir. 1971) (challenging manner in which Census Bureau determined residence of college students, persons confined to institutions, federal personnel and their dependents located outside the United States, and other citizens studying or working outside the United States who are not federal employees); *District of Columbia* v. *United States Dep't of Commerce*, 789 F. Supp. 1179 (D.D.C. 1992) (challenging Census Bureau's decision to count as residents of Virginia inmates of Lorton Correctional Facility, which is located in Virginia, but operated by the District of Columbia), appeal voluntarily dismissed, No. 92-5212 (D.C. Cir.); *Ridge* v. *Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989) (challenging inclusion of illegal aliens in 1990 census); *City of Willacoochee* v. *Baldrige*, 556 F. Supp. 551 (S.D. Ga. 1983) (challenging accuracy of population count of Georgia city); *Carey* v. *Klutznick*, 503 F. Supp. 874 (N.D. Ill. 1980) (suit to require Census Bureau to keep its offices in Cook County, Illinois, open and to continue the 1980 census to ensure that all housing units in Cook County were canvassed); *City of Philadelphia* v. *Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980) (challenging, among other things, Census Bureau's alleged hiring of unskilled enumerators and its failure to properly conduct local review); *Federation for American Immigration Reform* v. *Klutznick*, 486 F. Supp. 564 (D.D.C.) (three-judge court) (challenging inclusion of illegal aliens in 1980 census), appeal dismissed, 447 U.S. 916 (1980); *City of Camden* v. *Plotkin*, 466 F. Supp. 44 (D.N.J. 1978) (challenging manner in which Census Bureau conducted its 1976 "Pretest Census"); *West End Neighborhood Corp.* v. *Stans*, 312 F. Supp. 1066 (D.D.C. 1970) (challenging Census Bureau's decision to replace door-to-door method of

Karcher itself recognized the distinction between the determination of population by the decennial census, in which an undercount is to be expected, and the apportionment of seats in a state legislature based on the census totals, in which mathematical exactitude is achievable. See 462 U.S. at 731, 735-738. A reviewing court's belief that alternative measures would more likely than not have increased the distributive accuracy of the census scarcely suggests that the Secretary has failed to make a *good-faith effort* to achieve a fair apportionment. The Constitution allows for varying approaches to the conduct of the census and varying measures of accuracy and equity. In light of the Constitution's plenary grants of authority to Congress in the Apportionment Clause, the Necessary and Proper Clause, and Section 5 of the Fourteenth Amendment, the Secretary's "apparently good-faith choice of a method" for conducting the census (pursuant to broad discretionary authority conferred on him by Congress) "commands far more deference than a state districting decision." *Montana*, 503 U.S. at 464.

3. Even under the court of appeals' analysis, a necessary predicate for concluding that the Secretary had failed to make "a good-faith effort to achieve population equality" in this setting, *Karcher*, 462 U.S. at 740, would be that the Secretary had determined that the proposed adjustment would increase the accuracy of the States' "respective Numbers" (*i.e.*, *distributive* accuracy), but had nevertheless declined to make an adjustment. Only then could the burden shift to the government to show that the decision against adjustment was "necessary to achieve some legitimate [federal] objective." *Ibid.* The court of appeals simply erred, however, in inferring the lack of a

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enumeration with mail-out/mail-back procedure); *Quon* v. *Stans*, 309 F. Supp. 604 (N.D. Cal. 1970) (same).

good-faith effort to achieve population equality from the Secretary's acknowledgment that an adjustment would likely increase *numeric* accuracy at the national level. As discussed above (see pages 30-31, *supra*), the Secretary's focus on distributive rather than numeric accuracy was fully justified. The court of appeals did not explain how the goal of equal representation for equal numbers of people in the several States could be better served by focusing on the total *numeric* accuracy of the census figures at the national level. As the district court recognized, "[t]he Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits." Pet. App. 77-78. See also Br. in Opp. 39 (acknowledging that "distributive accuracy is the object of adjustment").

4. The district court did not purport to issue formal findings regarding the relative accuracy of the adjusted and unadjusted census figures. The court's treatment of the issue was somewhat enigmatic. On the one hand, the court stated (without significant explanation) that it was "satisfied that for most purposes the PES resulted in a more accurate—or to be statistically fashionable, a less inaccurate—count than the original census," Pet. App. 59, and it further observed that "were this Court called upon to decide this issue *de novo*, I would probably have ordered the adjustment," *id.* at 89. On the other hand, the court stated that "plaintiffs' failure to illustrate affirmatively the superior accuracy of the adjusted counts either (1) at any level mentioned in Guideline One, or (2) for any reasonable definition of accuracy, is sufficient to support a finding that Guideline One favors use of the original census counts." *Id.* at 78.

In any event, the district court clearly did *not* find that the Secretary had failed to make a *good-faith effort* to maximize distributive accuracy. A determination that the Secretary's stated conclusions were arbitrary or unreasonable conceivably could have suggested the lack of such an effort, cf. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815-819 (1982) (official's entitlement to "good faith" immunity is determined by reference to the objective reasonableness of the challenged conduct); but the district court held that the Secretary was "neither arbitrary nor capricious" in concluding that the superior distributive accuracy of the adjusted numbers had not been established. Pet. App. 77. There is consequently no basis for the court of appeals' assertion (*id.* at 38) that "the findings of the district court * * * plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable."

5. The court of appeals also referred repeatedly to the disproportionate undercount of racial minorities (see, *e.g.*, Pet. App. 33, 38, 39, 40), invoking that differential to support the proposition that the Secretary's decision not to adjust should be reviewed "under the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity." *Id.* at 39-40. The court of appeals was simply wrong, however, in its belief that "[e]qual protection analysis requires that heightened scrutiny be given to the Secretary's decision to adhere to an acknowledged undercount that concededly impacts minority groups more severely than nonminority groups." *Id.* at 34. To the contrary, establishment of an equal protection violation based upon racial discrimination requires proof of a discriminatory *purpose*. *Washington* v. *Davis*, 426 U.S. 229, 239-245 (1976). The intentional undercounting of

racial minorities in the conduct of the census would be a matter of grave concern to the integrity of our democratic process. The courts would be open to consider such claims under the analytical framework followed in *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and its progeny, and to afford relief where appropriate, see *Franklin*, 112 S. Ct. at 2776-2777 (opinion of O'Connor, J.).

Respondents have not contended, however, and neither the court of appeals nor the district court found, that either the Secretary or other federal officials acted for the purpose of reducing the electoral power of (or otherwise disadvantaging) minority residents. Indeed, in their briefs in the court of appeals, respondents did not even cite the Fifth Amendment's Due Process Clause, on which an equal protection claim against the federal government must be based. In any event, the evidentiary considerations identified in *Arlington Heights* do not suggest a basis for a claim of racial discrimination in violation of the Fifth Amendment.

The Secretary's decision against adjustment was fully in keeping with historical practice, a fact that suggests a lack of discriminatory intent. Compare *Arlington Heights*, 429 U.S. at 267 & n.16 (abrupt departures from prior policy in ways that disadvantage minorities may constitute evidence of discriminatory motivation); *id.* at 270 (defendant "has applied [its] policy too consistently for [the Court] to infer discriminatory purpose from its application in this case").[32] Secretary Mosbacher's exten-

[32] The Court in *Arlington Heights* also observed that "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." 429 U.S. at 267. In the present case, the Secretary departed from customary procedures only by devoting *enhanced* consideration to the possibility of a statistical adjustment and explaining his ultimate decision in greater detail.

sive explanation published in the *Federal Register* sets out a host of race-neutral reasons for his decision not to adjust. Compare *Arlington Heights*, 429 U.S. at 268 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."). The government's extraordinary efforts to enumerate minority residents[33] and to identify persons who initially failed to return questionnaires (see pages 27-28, *supra*) also belie any inference that Census officials pursued a deliberate policy of undercounting minority residents.

A disparate impact upon racial minorities, though not itself sufficient to establish a constitutional violation, may sometimes furnish evidence of discriminatory purpose. See *Arlington Heights*, 429 U.S. at 265-266; *Davis*, 426 U.S. at 242. In the present case, however, the ultimate effect of the undercount upon minority residents is both indirect and of uncertain magnitude. Those affected by

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[33] In her recommendation to Secretary Mosbacher, Census Bureau Director Bryant stated (J.A. 76):

> For the 1990 census, the Census Bureau mounted the most extensive effort ever to enumerate Blacks and other minorities. This included the hiring of 280 community outreach workers who worked in communities two years before census taking; involvement of 56,000 community organizations—mostly minority but also city and state Complete Count Committees; outstanding cooperation from Black and Spanish language media in running public service announcements and programs about the importance of the census; and the hiring of follow-up enumerators from minority populations, bilingual and multi-language enumerators, and residents of public housing projects and American Indian reservations to enumerate persons in their neighborhoods. Despite this effort, the undercount differential was not reduced below its historical level.

the undercount, it should be emphasized, are not the uncounted individuals themselves; an individual derives no concrete benefit from inclusion in the census, nor does he or she suffer any concrete injury from being left uncounted. Rather, those affected by the undercount include all residents of geographic areas that are assigned less than their true share of the population due to errors in the enumeration process. More precisely for purposes of this case, which involves a constitutional challenge based on the impact of the unadjusted census on the apportionment of Representatives among the States, those affected by the undercount include *all* residents (minority and non-minority, men and women, renters and homeowners) of a State that was assigned less than its "true" share of the total population of the nation and that, as a result, was assigned less than its "true" share of the total number of Representatives.

Respondents assert that "[b]ecause members of minority groups are not evenly distributed geographically, the consequence of the differential undercount is that areas in which members of minority groups are concentrated are systematically deprived of political representation and funding they would otherwise have received." Br. in Opp. 9.[34] Whatever the intuitive plausibility of that theory, however, respondents made no comprehensive effort at trial to demonstrate whether and to what extent States with large minority populations

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[34] As noted above, see page 5, *supra*, the PES also indicated that men, the young, and renters were undercounted at a higher rate than women, older residents, and homeowners. Assuming that members of those groups "are not evenly distributed geographically," it would be equally plausible to hypothesize that areas in which those demographic groups are concentrated would be "systematically deprived of political representation and funding they would otherwise have received."

would as a rule have been credited with a higher share of the country's population if the proposed adjustment had been made, let alone to demonstrate that their shares of the population would have been *more accurately* estimated by use of adjusted figures. See note 14, *supra* (noting that New York State's share of the nation's population would have been reduced by an adjustment). But in addition, respondents have not contended, and the courts below did not find, that the indirect and uncertain impact of the undercount upon the electoral power of minority residents furnished persuasive evidence of discriminatory intent. Absent a showing of intentional discrimination, the differential undercount of minorities at the national level provides no basis for subjecting the Secretary's decision against adjustment to a heightened standard of review.[35]

Respondents also argue that if use of an adjustment would alleviate the racially differential undercount at the national level, then, "*ceteris paribus*, adjustment would improve the *distributive* accuracy of the census." Br. in Opp. 43. The flaw in that argument lies in its premise ("*ceteris paribus*") that other things would remain equal —that the proposed statistical adjustment would lessen the racial disparity without introducing new errors or uncertainties into the enumeration. After extensive consideration of the views of experts on both sides of the adjustment question, the Secretary reached a different conclusion. He noted that he was "deeply troubled by this problem of differential participation and undercount of minorities," but concluded that "an adjustment does not address this phenomenon without adversely affecting the

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[35] Of course, the differential undercount of minority groups (and other demographic groups) may properly be taken into account by Congress or the Secretary in deciding whether to make a statistical adjustment as a matter of policy.

integrity of the census." Pet. App. 139. That determination was based on a reasoned analysis of the pertinent data and of the conflicting recommendations of the Secretary's advisors. Accordingly, even if we assume that a *Karcher*-type analysis applies to the Secretary's decision not to make a statistical adjustment to a census headcount that otherwise fulfills the purposes of the Census Clause, the court of appeals erred in concluding that respondents had carried their threshold burden of showing that the Secretary had failed to make a good-faith effort to maximize population equality.

6. With the issues of *Karcher* and racial discrimination thus put to one side, the only remaining issue is whether the Secretary acted within the range of discretion afforded by the Constitution in declining to make a statistical adjustment. The district court correctly concluded that the Secretary's determination was not arbitrary and capricious. Because respondents have not challenged that conclusion, the judgment of the district court should be affirmed. Now, halfway through the decade governed by the 1990 census, it is time to bring this challenge to that census to a close.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with directions to enter judgment for petitioners.

Respectfully submitted.

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Nos. 94-1614, 94-1631 and 94-1985

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IN THE
Supreme Court of the United States
October Term, 1995

STATE OF WISCONSIN, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

STATE OF OKLAHOMA, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

UNITED STATES DEPARTMENT OF COMMERCE, et al.,
Petitioners,

v.

CITY OF NEW YORK, et al., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS

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STATEMENT

In connection with the 1990 decennial census, the Census Bureau conducted a massive, long-planned program to determine the extent to which the census differentially undercounts minorities and to develop statistically adjusted census data to correct that differential undercount. In 1991, after completing its work and reviewing the accuracy of the uncorrected and the corrected census counts, the Bureau concluded that correction would increase the accuracy of the census and that the corrected data should be reported as the 1990 census. The Secretary of Commerce overruled the Bureau and decided instead to use the uncorrected data, even as he acknowledged those data contained a differentially severe undercount of minorities that correction would largely eliminate. Respondents challenged that decision as violative of constitutional guarantees of equal representation.

The district court, after a thirteen-day trial, agreed with respondents that the corrected data had been shown to be more accurate for most purposes. But the court determined that separation of powers concerns required judicial deference to the Secretary's decision, which, in the court's view, could be overturned only if arbitrary and capricious; moreover, the court tested the rationality of that decision only against the Secretary's own guidelines for the adjustment decision and not against the constitutional standard. Because the court found that the guidelines permitted the Secretary to ignore all comparisons of accuracy favoring the adjusted counts if the Secretary could identify any comparison as to which there remained uncertainty, the court ruled in favor of the Secretary. On appeal, the court of appeals rejected the standard of review employed by the district court. The court of appeals accepted the district court's finding that the corrected data were more accurate for most purposes and the uncontested fact that the uncorrected data reflected a differential undercount of minorities that was substantially ameliorated

by the proposed correction. The court of appeals concluded that the Secretary's decision was subject to heightened scrutiny, both because of the nature of the constitutional right impaired and because the decision against correction has a disproportionate impact on a suspect classification (members of minority groups).

Before this Court, petitioners attack the court of appeals' conclusion explicitly and the district court's findings implicitly. At the heart of petitioners' argument lies the claim that the uncorrected census counts are, or at least probably are, as accurate as or more accurate than the corrected counts. To accept that claim means more than just to review and reject the district court's findings of fact. To accept it means to accept as well that the Bureau labored for a decade to find a means of correcting the census; carefully constructed, tested and implemented such a mechanism; reached the conclusion that the mechanism had worked and recommended that the corrected counts were more accurate and should be reported as the 1990 census—and yet that the Bureau was fundamentally mistaken, that the Bureau's correction would have degraded rather than enhanced census accuracy and that only the intervention of the Secretary of Commerce, Robert A. Mosbacher, who disavowed any statistical expertise, saved the census from the Bureau's ill-considered plans. To accept petitioners' argument means, moreover, to accept an approach to defining and deciding questions of accuracy that is without precedent in the history of the United States census, without justification in terms of the constitutional and statutory uses to which census data are put, and without support in logic or law—an approach, indeed, that the United States repudiated before the court of appeals.

Petitioners' account of what the case involves is fundamentally defective, and their discussion of the court of appeals' opinion and the governing law, resting on a flawed foundation, is correspondingly in error. Understanding those

defects and their sources in the Secretary's decision requires, in the first instance, an accurate account of the problem of differential undercount and of how the Bureau addressed its resolution.

A. The Decennial Census

1. Two petitioners—the United States and the State of Wisconsin—refer, variously, to "the 200-year practice of relying upon unadjusted figures to apportion Representatives among the States", U.S. Br. 17; *see also id.* at 23, 31, and to "the 200-year practice of actual enumeration", Wisc. Br. 18, 23-24.[1] Similarly, in his decision against adjustment the Secretary said that adjusting the census would mean "abandon[ing] a two hundred year tradition of how we actually count people." Pet. App. 138. No petitioner has offered any more detailed account of that "practice" or "tradition."

Historically, census-taking in the United States does not reflect the monolithic tradition petitioners suggest. For example, until 1960 most residents were counted through a door-to-door enumeration: Bureau employees travelled across the country, census forms in hand, and recorded information reported to them by census respondents. By 1960, however, the expanding size of the country's population had made door-to-door enumeration prohibitively expensive and time-consuming, and the Bureau had come to recognize that for most respondents the old technique did not secure the most accurate information. The Bureau turned to a mailout and mailback of census questionnaires, and the 1960 census was

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[1] References to the Brief for the Federal Petitioners are given as "U.S. Br."; references to the Brief of Petitioner State of Wisconsin are given as "Wisc. Br."; references to Petitioner Oklahoma's Brief on the Merits are given as "Okla. Br."; references to the joint appendix are given as "Jt. App."; and references given as "Pet. App." are to the appendix to the petition in No. 94-1614.

the first in which the majority of the population was counted through a technique that involved no direct contact between Bureau employees and census respondents.[2] Censuses since 1960 have relied principally on the mailout/mailback of questionnaires, with door-to-door enumeration a second step in the census process.

Acceptance of mailed questionnaires is only the most obvious of the many ways in which the census has grown more sophisticated since 1790. Use of statistical adjustment is another refinement. It is simply untrue that the census data have never been statistically adjusted—in that sense, there is either no "two hundred year tradition of how we actually count people" or "actually count[ing] people" is a more elastic concept than the casual reader might assume. And it is equally untrue that the apportionment of the House of Representatives has never been based upon statistically adjusted census data. There is no "200-year practice of relying upon unadjusted figures to apportion Representatives among the States."

In 1970, for example, the Bureau conducted a sample reinterview survey of 13,546 housing units that enumerators had initially reported to be vacant, determined that 11% of those units were actually occupied and adjusted the decennial census accordingly. To adjust, the Bureau generalized the results of its survey to all housing units that had initially been reported vacant, deeming 11% of them occupied. To generate populations for the units deemed occupied, and characteristics for the generated populations, the Bureau used a type of probabilistic technique known as statistical imputation: each unit deemed occupied was assigned the same number of residents, with the same characteristics (race, sex, age and so on), as the unit that followed it in the Bureau's processing

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[2] Margo J. Anderson, *The American Census: A Social History* 201 (1988).

sequence. On the basis of imputation, the Bureau added 1,069,000 persons to the 1970 census count. Tr. 260, 268-271; PX 474 at 11-14. The same decennial census was also adjusted in one part of the country by the Post-Enumeration Post Office Check. In rural Southern areas where the Bureau found that housing units had been omitted from its address lists, it asked the Post Office to recheck the Bureau's lists, conducted a sample of interviews for omitted addresses and generalized the results throughout the region to add another 484,000 persons. Tr. 269-273; PX 474 at 15-16.

In 1980, where the Bureau had no other source of information about the occupancy status of housing units, statistical imputation was used to generate a status (occupied or vacant) and then, for units imputed to be occupied, to generate resident populations and their characteristics. Imputation added to the 1980 counts 762,000 persons in housing units for which occupancy status was unknown. Tr. 273-274. The result affected the apportionment of the House of Representatives, shifting a seat from Indiana to Florida. Indiana sued to reverse the outcome, *Orr v. Baldrige*, No. IP 81-604-C (S.D. Ind.), but the Bureau's decision to proceed with imputation (and the consequent effect on apportionment) was upheld. Tr. 274, 1289-1291, 1843.

2. Recognizing that the Bureau uses statistical adjustment only hints at the complexity of "how we actually count people." When the Bureau imputes an occupancy status to a housing unit for which no occupancy status is actually known, when the Bureau then imputes to that unit a number of residents and imputes to them particular characteristics, the Bureau is surely creating a datum that, in one sense, can be described as an error: it is very unlikely that the particular unit that, as a result of imputation, is deemed occupied by three persons (a 30-year-old white male, a 29-year-old white female and a 5-year-old white female), is actually occupied

by three persons with those characteristics. Yet imputation is in keeping with the Bureau's overall approach to the census.

That approach begins with the recognition that the census is inevitably laden with error. The National Academy of Sciences has observed, "The evidence is overwhelming that no counting process, however diligent, will in fact enumerate everyone." PX 2 at 17. A survey of a quarter-billion persons cannot achieve perfect accuracy, locating every person exactly where he or she resided on Census Day.

Census errors are of two kinds—gross omissions (persons who were not counted at all but should have been or who were not counted at the right location) and erroneous enumerations (persons who were counted but should not have been, because they were born after or died before Census Day or because they were not residents of the country or because they do not exist, persons who were counted two or more times and persons who were counted at the wrong location).[3] Tr. 80-83; PX 54, App. 3 at 1-2. Those kinds of errors are endemic to the census: for example, in 1991 the United States General Accounting Office ("GAO") estimated that "the 1990 census contained a minimum of 14.1 million gross errors and perhaps as many as 25.7 million errors, depending on how broadly census error is defined." PX 16 at 1. GAO's minimum estimate is based on 9.7 million gross omissions and 4.4 million erroneous enumerations.[4] *Ibid.* The Secretary

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[3] When a person who was a resident of the country on Census Day is counted just once, but at the wrong location, there is both a gross omission (at the location at which the person should have been counted) and an erroneous enumeration (at the location at which the person is actually counted).

[4] GAO also pointed out that that level of error represented a substantial degradation in data quality from 1980. Using the same "minimal definition of census error," GAO found that the 1990 census contained far more error (14.1 million errors in a count of about 248.7 million) than the 1980 census (7.8 million errors in a count of about

himself, in his decision, accepted as a "defensible" maximum estimate the Bureau's calculation of 19.1 million gross omissions and 13.1 million erroneous enumerations. Pet. App. 261. Earlier this year, the National Research Council estimated total error in the uncorrected 1990 census counts at about 20 million gross omissions and 16 million erroneous enumerations.[5] Thus, the amount of error in the uncorrected 1990 census is between 5.7 and 14.4 percent of the overall population figure.

Error arises at every step of the census-taking process. The Bureau begins the census with the construction of address lists for the mailout of questionnaires (and later follow-up by enumerators); irregular, unreported housing units (converted garages, subdivided apartments) are often missed. Tr. 108-111; PX 455 at 9; PX 456 at A001722. Mailed questionnaires are subject to loss or vandalism. Tr. 136-137. The complexity of the questionnaire and ambiguities in classifying individuals who reside temporarily at one or more addresses lead to both omissions and double-counting. Tr. 149; PX 464 at 163; PX 465 at 007701.

For housing units that do not respond to the mailed questionnaire, the Bureau deploys enumerators to conduct the door-to-door phase of the census called non-response follow-up. Pet. App. 327-328. In 1990, the Bureau had projected and planned for a mail response rate of 70%; in fact, the mail response rate was only 63%. Pet. App. 327. The lower-than-expected mail response rate placed unanticipated burdens on the Bureau's enumerators, the vast majority of them temporary, short-term employees. Tr. 132, 1823; PX 383 at 7; PX 458. Enumerators were instructed to make six attempts at contact, three in person and three by telephone, after which

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226.5 million). PX 16 at 7.

[5] National Research Council, *Modernizing the U.S. Census* 33 (1995).

they were permitted to obtain "last resort"[6] information from a person deemed "knowledgeable" by the enumerator. Tr. 161. Last resort information therefore came from neighbors, building superintendents, local mail carriers or local police officers. Tr. 161. By that stage of the process, the Bureau has no doubt that the quality of the information is of limited reliability. Tr. 1825-1827.

An example of the unreliability of last resort information is provided by results of the Bureau's "Pop 1" check. During the 1990 census the Bureau heard reports that enumerators were mechanically listing the populations of large numbers of housing units as one person, without any actual information to support their reports. Tr. 175. The Bureau rapidly created "Pop 1," an *ad hoc* check of housing units for which enumerators had reported single residents from last resort information; the Bureau found the counts in error in 44% of the housing units rechecked. Tr. 178; PX 473. "Pop 1" was limited to only 24 (of 447) district offices and covered only 128,000 housing units. Tr. 176-178; PX 473. But in a national survey of 1,000 one-person housing units counted during non-response follow-up, the Bureau found over 20% of the count in error. Tr. 180; PX 473. The Bureau did not adjust the counts on the basis of those results, concluding that it would rely instead on the more comprehensive post-enumeration survey that is the subject of this litigation. Tr. 180; PX 473 at 1.

That the decennial census has so much error does not mean that it is worthless. It does, however, suggest the complexity of defining what census error is and, indeed, what

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[6] Technically, "last resort" information was supposed to include "at least basic information on household member(s)", Pet. App. 328, but in the late stages of non-response follow-up, when Bureau offices began shutting down, even less thorough "closeout" data were accepted. Tr. 162-163.

the census itself is. The census is not a simple headcount of the national population. It is an estimate, and it is affected by the choice of techniques that go into its production. As Vincent Barabba, formerly Director of the Census Bureau, wrote in his book *The 1980 Census: Policy Making amid Turbulence* (1983) (with Ian Mitroff and Richard Mason):

> "The number that is accepted as [the] true population of the United States is merely a scientific estimate. This estimate is not a simple addition of all persons and only those persons directly enumerated by census enumerators. Indeed, the number of people in the United States cannot be confirmed by immediate experience. It is dependent on complex scientific and management models and processes that are designed to ensure the taking of an accurate census insofar as humanly possible."

PX 13 at 5. Similarly, Barbara A. Bailar, then Associate Director of the Bureau for Statistical Methodology, wrote in a 1983 paper, "Counting or Estimation in a Census—A Difficult Decision":

> "The issue is not really whether there should be counting or estimation; the real issue is how much estimation there should be. There has probably always been some estimation in the census."

PX 14 at 3; *see also* Tr. 1510-1515. The conventional formats in which the Bureau releases the best-known census data products obscure the extent to which the census is an estimate. The Bureau uses exact, unrounded numbers unaccompanied by estimates of error to describe the population: for example, the official, unadjusted 1990 census count of the national population is 249,632,692. Pet. App. 49. The Bureau also issues, for redistricting purposes, block-level census data. The happenstance that the Bureau uses those formats does not change the fact that, at both the national and block level, the counts are estimates.

Viewing the census as an estimate entails recognition that, for the purposes for which the census is conducted, many errors are random and thus offset one another. It would be misleading to characterize the unadjusted 1990 decennial census as about 10% error and to leave the matter at that. Much error appears only at the block level. Consider, for example, a person who is otherwise correctly counted but located in the census counts at the wrong address in a block adjacent to the one in which he or she should properly have been counted: both block counts are erroneous, but the larger unit that includes the two blocks (the census tract) is unaffected. At the block level, census counts are indeed highly inaccurate.[7] But as those counts are aggregated, random errors cancel: for example, the omission of one person who should have been counted is offset by the erroneous double-counting of another person in the same town. The census thus achieves greater accuracy at the higher levels of aggregation at which census data are actually used—from the local legislative district on up through the town, the county, the State and the nation. Tr. 1314-1316.[8]

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[7] Analysis of block-level inaccuracy in the uncorrected 1990 census did not take place until after the trial of this action. Recent Bureau research on the block-level error structure of the uncorrected census is discussed in National Research Council, *Modernizing the U.S. Census* 35-37 (1995).

[8] Because accuracy in census-taking depends upon development of a complex system for balancing error, rather than simply adding observations to produce a more complete "headcount," naive intuitions about the value of increasing resources are often mistaken. Making what is intended as a rhetorical point, Wisconsin writes:

> Hiring 400,000 enumerators should produce a more accurate census than employing 300,000, yet either level would seem constitutionally permissible. * * * Ten attempts at non-response follow-up should yield more accurate counts than six attempts, which should yield more accurate counts than four attempts.

The combined pattern of omissions and erroneous enumerations yields net undercount (or overcount, as the case may be), which is simply the difference between total omissions and erroneous enumerations at a particular level of aggregation. Tr. 90. Although omissions and erroneous enumerations can be treated as cancelling out one another at particular levels of aggregation (such as the nation as a whole), they are not distributed evenly (certainly not across the entire nation). Tr. 89-90. A net undercount of zero, therefore, cannot be taken as indicating an absence of census error at subordinate levels of aggregation nor an absence of differential undercount. Tr. 90-91. As GAO reported, "A focus on the *net* undercount obscures the true magnitude of the error in the census because, while millions of persons were missed by the census, millions of other persons were improperly counted." PX 16 at 1 (emphasis in original). Moreover, although some census error is random, much of it is not. It is systematic error that creates the differential undercount.

Wisc. Br. 22. Neither survey research in general nor census-taking in particular is so simple. There is no necessary reason to suppose that more enumerators or more attempts at non-response follow-up will increase *accuracy*. Either approach would surely add *responses*. But the fact of more responses does not translate unproblematically into the fact of increased accuracy. Beyond a certain point, additional responses are disproportionately likely to add error, because a disproportionate number of "late census additions" are erroneous enumerations. Tr. 1825-1827. The particular level of non-response follow-up selected by the Bureau—six attempts—may well represent the best balance of addition of new information and limitation of error in the interest of maximizing accuracy; it is not obvious a different balance would have increased accuracy. In fact, it is entirely plausible that in 1990 the Bureau did the best job possible of counting the population under the constraints of "traditional" means of conducting the census. The Bureau itself believed so, which is why it focused on adjustment, rather than expanding other census operations, as the vehicle to reduce differential undercounting.

3. When census error occurs systematically, that is, when the same causes consistently create the same types of error, aggregation does not help: there are no offsetting errors of the opposite type to improve accuracy. There is no dispute that the most serious source of systematic error in the census is the differential undercount of minorities. That differential undercount has been a feature of the census for a long time—probably for as long as the decennial census has been conducted. Tr. 1276. Because minorities are geographically concentrated, the differential undercount has consequences in terms of the fairness with which political power and governmental funds and services are allocated. Tr. 103-105; Jt. App. 79; Pet. App. 128-129.

When he announced his decision against adjustment, the Secretary estimated that in the 1990 census blacks had been undercounted by 4.8%, Hispanics by 5.2%, Asian/Pacific Islanders by 3.1% and American Indians by 5.0%, while non-blacks (a category that includes some Hispanics) had been undercounted by 1.7%, Pet. App. 138-139; thus, the black/non-black differential undercount was estimated to be 3.1. That estimate was in keeping with experience from other censuses and using other measurement techniques.

By one yardstick, demographic analysis (which provides a measure of the black/non-black differential at the national level), the black/nonblack differential has had the following notable constancy: in 1940, when the overall undercount (*i.e.*, for all residents, regardless of race) was 5.4%, the black undercount was 8.4% and the non-black 5.0%, for a differential of 3.4; in 1950, the overall undercount fell to 4.1%, but the differential rose to 3.8; in 1960, the overall undercount fell again, to 3.1%, and the differential rose again, to 3.9; in 1970, the overall undercount went down to 2.7%, and the differential went up once more to 4.3; in 1980, the overall undercount dropped to its lowest level, 1.2%, and the differential fell to 3.7; in 1990, by demographic analysis, the

overall undercount was up to 1.8%, and the differential undercount rose to its highest recorded level, 4.4. Tr. 195-199; PX 476; PX 477. Uncertainties in demographic analysis suggest that marginal changes in undercount rates should not be overemphasized; but the pattern of consistency in the differential undercount is a reliable indication that differential undercount is a real and persistent problem in the conduct of the decennial census. Tr. 883-887; PX 184; PX 197.

Demographic analysis does not permit analysis of undercount by local areas, such as States, nor does it give a separate figure for Hispanics. However, the Bureau's 1980 post-enumeration program and the 1986 test census in East Los Angeles confirmed a differential undercount of Hispanics and the concentration of differential undercounts of blacks and Hispanics in inner cities. Tr. 1277; PX 5, App. E.

4. Why differential undercount occurs is no mystery; it is an inherent consequence of the method currently used to conduct the census. Tr. 105-106. The problem is not that the census is badly conducted; the problem is that because of the social arrangements that govern an increasingly diverse and mobile population, the method used to count the population inevitably produces an undercount that is more severe among certain parts of the national population. Tr. 505-506. At each step of its conduct, the census-taking process, despite the Bureau's best efforts, systematically generates a differential undercount. Tr. 106-194.

Under the census-taking approach used in 1990 and for previous decennials, the first problem arises in the construction of the address lists used by the Bureau as the basis for the mailout of census questionnaires and, later, to determine the housing units from which no responses have been received and to which enumerators will be sent. Tr. 129-130. Minority households, disproportionately located in inner city neighborhoods, are more likely to be left off the address lists; they are also less likely to receive questionnaires mailed

out to them. Tr. 136. Minorities who do receive questionnaires are less likely to complete and return them, because of language difficulties and because the complex questionnaire is daunting for someone with less education or a more complicated family structure. Tr. 144-146. For the same reasons, even if the questionnaire is filled out and returned, it is more likely that it will contain errors than will the typical questionnaire filled out by a non-Hispanic white respondent. Tr. 146-151.

Because mail response rates are lower in inner cities, the census relies more heavily there on enumerator visits. Those areas are the ones where the Bureau encounters the greatest difficulty in hiring and retaining enumerators, and the enumerators who are hired are least likely to obtain information sought—because addresses in projects and irregular multi-unit structures are hard to find, because fear of crime discourages enumerators from aggressive interviewing, and because language problems impede interviewing. Tr. 164-165, 1825.

If an enumerator cannot get a response from a member of a household, the unit may be counted through the less reliable alternatives of "last resort" or "closeout" or treated as "non-data-defined." Tr. 160-163, 1825-1827. Bureau research on the 1990 census shows that "last resort" counts reflect serious undercoverage. Tr. 176-178; PX 473. In the 1990 census, minority households were more likely than others to be enumerated through "last resort" or "closeout" or treated as "non-data-defined." Tr. 171-174.

The persistence of a differential undercount does not reflect badly on the Bureau. In 1990, as in 1980, the Bureau made every effort to overcome those problems through expanded outreach efforts, but in 1990, just as in 1980, those efforts failed to reduce, let alone eliminate, differential undercounting. As the former Chief of the Bureau's Statistical Research Division, Kirk M. Wolter, stated at the trial of this

action, "In spite of all the Bureau's good efforts, and in spite of decades of work, in spite of billions of dollars over the many decades, the differential undercount has remained persistent, constant, almost intractable, at least intractable for the kinds of conventional enumeration methods the Bureau has utilized." Tr. 506.

B. Census Correction

1. Having long known of the existence of the differential undercount, the Bureau was aware in 1980 that the census that year reflected the same problem. Accordingly, the Bureau considered whether to correct the 1980 census to alleviate the problem. Tr. 1276.

Through Department Organizational Order 35-2A of August 4, 1975, the Secretary of Commerce had delegated to the Director of the Bureau authority to conduct the census as the Director determined. Tr. 1284-1285; PX 604. In 1980 Secretary of Commerce Philip A. Klutznick reaffirmed to Director Barabba that the delegation meant the determination whether to correct the 1980 census was to be made by the Director, which would prevent the appearance of partisanship in the decision. Tr. 1285-1286; PX 605.

The Bureau decided against adjusting the 1980 census, despite the differential undercount affecting it, because of technical limitations on each of the two techniques that might have been available for the purpose. Tr. 1282-1283. One possibility that the Bureau considered was adjusting on the basis of demographic analysis. But demographic analysis—which uses historical comparison of records of births, deaths and in- and out-migration—does not yield local level data. Tr. 1282-1283. The other possibility that the Bureau had was to use the results of the post-enumeration program ("PEP"), a forerunner of the post-enumeration survey used in 1990. The PEP had indeed generated valuable data reflecting the dimensions of undercounting in the 1980 census; however,

problems of missing data and matching error and other uncertainties about the survey's error structure made the PEP unsuitable, in the Bureau's view, for use in adjusting the census. Tr. 1277-1283.

Although concluding that the 1980 PEP could not be used for adjustment of the 1980 census, the Bureau was encouraged by what it had learned in conducting the PEP and believed adjustment might be feasible in 1990. Tr. 567-568. The Bureau determined that addressing the problem of differential undercount would be made a major priority in planning for the 1990 census. Tr. 516-521. The Bureau began planning for the 1990 census and adjustment in the early 1980's. Tr. 522-526.

In 1984-1985, the Bureau established an Undercount Steering Committee, comprising the senior Bureau executives whose divisions would be most directly involved, to coordinate the statistical and demographic research and the operational planning necessary for a possible adjustment of the 1990 census. Tr. 516-521, 1292. The Bureau also established an Undercount Research Staff, under the supervision of Dr. Wolter, which was charged with research into the causes of differential undercount, determination of the best approach to reducing differential undercount in the 1990 census and coordination of research to achieve that goal. Tr. 516-521.

Public review of the Bureau's research projects was a formal part of that process. PX 545 at 1. Believing it important to establish a consensus of support among professional groups and other communities that use decennial census data, the Bureau established contact with outside groups. Tr. 521-525. Standing advisory committees of, among other organizations, the American Statistical Association and the American Population Association were asked to review and comment upon Bureau research initiatives and findings in the areas of undercount and correction during the 1980's.

Tr. 1295-1296. The Bureau also contracted with the National Academy of Sciences ("NAS") to create a Panel on Decennial Census Methodology to provide the Bureau with wide-ranging advice drawn from a number of academic specialists approaching the issue of statistical correction from different backgrounds and orientations. Tr. 1295-1296, 1469-1474.

As a result of the Bureau's communications and coordination with independent academics and researchers, with the advisory committees, and with the NAS panel, consensus was reached that the post-enumeration survey could ameliorate the differential undercount. Tr. 524-525, 622-623. Except for a few theoretical extremists, the statistical community concluded that adjustment of the census was feasible. Tr. 525, 1383-1386.

After reviewing other possibilities, the Undercount Research Staff focused its analysis on further development of a "capture-recapture" or "dual system estimation" approach, picking up from the work that had been done in connection with the PEP. Tr. 560-561. The essential feature of dual system estimation is the use of a second measurement to ascertain the quality of estimation obtained by an initial measurement. Put in terms of a census, a dual system estimate is obtained when an initial survey (the enumeration, or "capture") is followed by a second measurement (the post-enumeration survey, or "recapture"), in which the variable to be measured is the frequency with which persons were properly recorded in the first count. Tr. 506-513. The Undercount Research Staff concluded that dual system estimation held the greatest hope for effective correction of the census to reduce differential undercount. Tr. 560-561.

2. The Undercount Research Staff, during the mid-1980's, developed a post-enumeration survey that would overcome the obstacles that had prevented making use of the PEP as a basis for adjusting the 1980 census. Tr. 567-575. Using the PEP as a starting point, the Bureau designed the 1990 PES with error-

resistant improvements. PX 703. Among many other refinements were a process for construction of an independent address list to permit identification of errors arising from inadequacies in the lists used for the uncorrected counts, Tr. 209-210; PX 9 at 4-11, and development of an automated matching system to facilitate reliable comparison of the populations found in the original count and in the PES. Tr. 508-509, 1297-1298.

The actual adjustment to be produced by the PES would be carried out through post-stratification. Tr. 513. For that purpose, the country would be divided into more than a thousand post-strata (ultimately, the Bureau settled on an arrangement involving 1,392 post-strata), each defined by geography, age, race, sex, Hispanic (versus non-Hispanic) origin and "tenure" (status of the housing unit as rented or owner-occupied). Tr. 513-514. The categories selected were the ones the Bureau had determined in its own research and in its review of research by other specialists to provide the greatest explanatory power in analyzing differences in undercount rates. Tr. 513-514. Thus, the Undercount Research Staff approach would provide one undercount figure for, say, black males between the ages of 20 and 29 living in rented housing units in New York City, another figure for black females of the same age group living in the same units, another for equivalent non-black Hispanic males and so on. Tr. 513-514; PX 54, App. 5. The post-stratification scheme, by dividing the country into an exhaustive set of non-overlapping post-strata, would define a unique undercount factor associated with each person. Tr. 513-514. The actual adjustment would be based on application of the undercount figures associated with particular post-strata to the blocks in which those post-strata were located. PX 54, App. 3.

The Bureau's post-stratification was designed to control "correlation bias"—the tendency of the PES to miss the same people missed by the uncorrected census. In estimating the

population, a post-enumeration survey that groups together persons with low capture probabilities and persons with higher capture probabilities will tend to understate the undercount. Tr. 578-579; PX 5 at 9-2. The principle underlying the Bureau's post-stratification design was to group within each post-stratum individuals having a generally similar likelihood of being counted in the census. The assumption was not that they would share exactly the same probability, but rather that individuals within a post-stratum would be more similar to one another (with respect to their likelihood of being counted in the census) than to individuals in other post-strata. Tr. 205-208.[9]

The design of the PES represented an improvement over the 1980 PEP in important respects. But the PES—and the contemplation of its use to correct the 1990 census—did not represent a radical departure in the conduct of the census. As already observed, the Bureau had made use of statistical adjustment in previous censuses.

The specific technique of a post-enumeration survey had been repeatedly used, in one form or another, by the Bureau, well before 1990. The Bureau conducted its first post-enumeration survey in 1950. PX 19. It used variations on the technique in 1960 (PX 20), 1970 (PX 21), and 1980 (PX 3). More generally, the capture-recapture model, upon which the post-enumeration survey technique is based, has been applied to human populations since 1931, when it was first used in connection with the Canadian census. Adaptations of the technique to the census context have been discussed in the

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[9] Thus, the United States is misleading in writing, "For example, a post-stratum for white single male renters, aged 20-29, living in New York City 'assumes' that the capture probability for a 29-year-old white male law firm associate living in a rented condominium in Manhattan is the same as the capture probability for a 20-year-old white male laborer who rents a room in Queens." U.S. Br. 12.

scientific literature for decades. Tr. 1528-1532; PX 18. Other components of the PES design, such as stratification and smoothing,[10] are also widely used by the Bureau or other survey researchers. Tr. 514-515.

The PES and its components were subjected to a rigorous battery of field-tests throughout the mid-1980's. Tr. 602-603. There were tests in Tampa, Florida in 1985, in Mississippi and in Los Angeles in 1986, and in North Dakota in 1987. The PES was further tested in the "dress rehearsal" census conducted in 1988 in St. Louis, in other parts of Missouri, and in Washington State. Tr. 602. Multiple testing ensured that every aspect of the PES was tested under field conditions and also gave the Bureau test results to permit further refinement and improvement of PES design. Tr. 602-603. The tests confirmed the reliability of the PES design, the success of the Bureau's innovations and the ability of the adjustment process to generate more accurate census counts. Tr. 609-614. The tests also showed that the PES would find many—but by no means all—persons missed by the census; adjustment would improve census accuracy but would not *over*correct the undercount. Tr. 612-613.

3. By the spring of 1987, the Undercount Research Staff had completed extensive research on, planning for and field

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[10] Where multiple, related post-strata are created, survey researchers often assume that useful information about the behavior of one post-stratum may come from other, related post-strata. Smoothing in the PES supplies that information systematically, by using other PES-derived data to "predict" the undercount rate for a post-stratum and then generating a weighted average of the predicted and observed undercount rates. Smoothing enhances confidence in PES-derived undercount rates and does so, technically, by reducing sampling error. While it is true that, as the United States says, smoothing is an "attempt to correct for sampling error", U.S. Br. 9, every component of the uncorrected census, from non-response follow-up through last resort and closeout, could equally well be described as an "attempt to correct for non-sampling error."

tests of the PES. Based on that body of work, Dr. Wolter and the Undercount Research Staff concluded that adjustment of the 1990 census was technically feasible. Tr. 619; PX 5; PX 148.

The basis for their conclusion was the determination that their work had successfully identified all major potential sources of error in the PES-based adjustment. PX 5 at 7. The eight sources of error were missing data, matching error, error in determining the number of erroneous enumerations, fabrications, balancing error, respondents' misreporting of Census Day address, correlation bias and random error. PX 5 at 2-1 to 2-3. Dr. Wolter and the Undercount Research Staff determined that the PES-based adjustment designed by the Bureau could be expected to control all sources of possible error, yielding an adjustment more accurate than the uncorrected census counts. PX 148.

As the Bureau moved forward with planning for adjustment, however, the Commerce Department for the first time displayed an interest in the subject—an interest that immediately took the form of hostility. In a memorandum dated May 19, 1987, Harry A. Scarr, executive assistant to Under Secretary Robert Ortner, wrote to Dr. Ortner: "You asked for problems with adjustment. Here are some." PX 574, cover memorandum. Dr. Scarr went on to identify, as "adjustment problems," the facts that:

> "In general, it can be assumed that states or places with large minority populations will have population added to their counts. * * * States with large minority populations would benefit from an adjustment and states with small minority populations would lose seats."

PX 574, attached memorandum at 1. And he pointed out "groups that are likely to be pro adjustment" and "groups that are likely to be against adjustment." Among the former, Dr. Scarr particularly expected to find "[p]oliticians from those

cities or places with large minority populations"; among the latter, he noted "[p]oliticians representing those areas which might be expected to lose shares of fixed pies . . . , i.e., those areas with small minority populations." PX 574, attached memorandum at 4.

On May 20, 1987, the Bureau's senior staff met to discuss a recommendation on planning for adjustment. With virtual unanimity, the staff concluded that adjustment was technically feasible, although there were reservations expressed about the Bureau's ability to provide a timely set of corrected figures. Tr. 1310-1317; PX 597. Under the direction of the Bureau's Associate Director for Statistical Methodology, Dr. Bailar, a record of the staff's deliberations was compiled and presented to the Bureau's Director, John G. Keane. Tr. 1310-1311; PX 597. After reviewing the record, Dr. Keane concluded that prospects for a successful adjustment were good, that the problem of differential undercounting was serious and otherwise intractable, and that the Bureau should proceed with plans to adjust the 1990 census. Tr. 1318.

Dr. Keane made his decision assuming that, as with all other decisions about census operations and pursuant to the existing delegation of authority from the Department of Commerce to the Director of the Census, the decision whether to proceed with planning for adjustment was one that he had the authority to make. Thus, Dr. Keane prepared for the public announcement of the Bureau's determination to proceed with plans for a correction, including the development of an appropriate press release and body of material for general circulation. Deposition of John G. Keane ("Keane Dep."), at 448-449. Before making a public announcement, however, Director Keane met on June 2, 1987 to brief Under Secretary Ortner, his immediate superior. Tr. 1320. In that briefing, Director Keane explained the rationale for his decision:

> "No matter how well we conduct the 1990 census we do not expect to eliminate the differential undercount. * * * We use every known cost efficient counting procedure and advertising approach to cover those segments of the population we miss. Statistical techniques are the only potential means of reducing the differential undercount."

PX 232 at 1.

After that briefing, the Commerce Department removed the authority to decide the adjustment question from Director Keane. Tr. 1321; Keane Dep. 452-453. Although the Department issued no immediate statement, on October 30, 1987 it issued a press release informing the public that the 1990 census would not be adjusted. PX 475. The press release, two-and-a-half pages long, offered little explanation for the decision, other than the general assurance that the 1990 census was expected to be good enough not to need adjustment. *Ibid.*

The *City of New York* lawsuit was filed in November 1988, after plaintiffs had spent a year obtaining, pursuant to Freedom of Information Act requests, and reviewing the documentation supporting the Bureau's determination to proceed with planning for adjustment. Plaintiffs initially sought a preliminary injunction to reinstate the Bureau's plans for the PES, without which there would be no possibility of adjusting the 1990 census. On July 17, 1989, as the district court was about to begin a hearing on the application, the parties entered into a stipulation, simultaneously entered as an order of the court, resolving the motion. Jt. App. 61. Among other provisions, the 1989 stipulation vacated the Department's decision against adjustment and committed the defendants to reconsider the question of adjustment with an open mind and without prejudgment (¶ 2); obligated the defendants to conduct a PES of not fewer than 150,000 housing units—a number they represented to be large enough for the purpose—and all other adjustment-related operations

necessary to ensure the possibility of using the PES-based population figures to adjust the census (¶ 3); required the defendants to "develop and adopt guidelines articulating what defendants believe are the relevant technical and non-technical statistical and policy grounds" for the adjustment decision (¶ 4); required that the Secretary announce a decision by not later than July 15, 1991 and that, were he to decide against adjustment, he accompany the decision with a detailed explanation of the grounds therefor (¶ 5); required that any census counts issued before the adjustment decision be accompanied by a legend advising recipients that the data were subject to possible adjustment (¶ 6); and established that the Secretary would appoint a special advisory panel of eight members (¶ 7), four of whom were to be nominated by plaintiffs' counsel and the other four selected by the Secretary at his discretion. Jt. App. 62-64.

4. The Department of Commerce published eight guidelines for the adjustment decision on March 15, 1990.[11]

The guidelines did not lay the groundwork for a neutral decision on adjustment dictated solely by a determination whether adjustment would increase the accuracy of the census. Ignoring the history of statistical inference in compilation of past censuses and unwilling to acknowledge the Bureau's expertise in assessing improvements in census

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[11] Each of the eight guidelines was accompanied by an "explanation." Final Guidelines for Statistical Adjustments of 1990 Census, 55 Fed. Reg. 9,838 (March 15, 1990). The material reproduced in the Secretary's decision includes the original guidelines and the explanations that accompanied them upon their publication; the discussions in the decision were not published until issuance of the Secretary's decision. For the original guidelines and explanations (corresponding to the March 15, 1990 publication), *see* Pet. App. 151-156 (text of guideline and explanation for guideline one); 202-203 (guideline two); 213-214 (guideline three); 228-229 (guideline four); 238 (guideline five); 241-242 (guideline six); 249 (guideline seven); 256-257 (guideline eight).

accuracy, the Department stated that "the assertion that a method involving statistical inference could lead to a more accurate enumeration warrants close scrutiny." Pet. App. 152. For purposes of that "close scrutiny," the Secretary's first guideline erected a presumption in favor of the superior accuracy of the unadjusted counts. To rebut that presumption, "the evidence . . . must show *convincingly* that the count can be improved by statistical adjustment at national, state *and local* levels." *Ibid.* (emphasis supplied). The requirement of *convincing* evidence of improvement at *local* levels would necessarily subject the adjusted figures to a test of extraordinary rigor; nowhere in the guideline or its explanation, however, is there an attempt to justify imposition of that test in terms of improving the accuracy of census data for their constitutionally or statutorily required uses.

As its broad language foretold, guideline one was to become the primary basis for the Secretary's decision. The presumption against correction was invoked to justify the Secretary's disregard of evidence that the adjusted counts improved the numeric accuracy of the counts, his concern that improved distributive accuracy be demonstrated across a wide range of comparisons without regard to how census data are actually used and his approach to analyzing distributive accuracy—an approach the United States subsequently admitted was invalid. In practice, the presumption against correction in guideline one proved irrebuttable, permitting the Department of Commerce to reinstate its 1987 decision against correction. That presumption, and only that presumption, underlies the Secretary's determination that the adjusted counts that ameliorate the differential undercount are less accurate than the unadjusted counts that preserve the differential undercount.

5. The uncorrected 1990 enumeration confronted all of the difficulties that have typically prevented the census from achieving an accurate count of such groups of Americans as

minority residents of inner cities. As the count progressed, there were constant indications that the census, once again, was having difficulty enumerating that hard-to-count population, just as the Bureau had predicted, and that coverage improvement programs would not be able to offset that disadvantage. Tr. 260-263.

The uncorrected census counted 248.7 million residents of the United States. The PES-based adjusted census counted 254.0 million. PX 478. Demographic analysis estimates provided a national population figure of 253.4 million, not significantly different from—and thus essentially confirming—the PES-based count. PX 55 at 5-7, 10.

The PES-based estimate found that the overall net national undercount rate for the uncorrected enumeration was 2.1%, or 5.2 million out of a population of 254.0 million. As expected, the undercount was far more severe among minorities. The undercount rate for blacks was 4.8%. Of the population missed by the uncorrected enumeration, more than 1.5 million out of 5.2 million were black; thus, while constituting only 12% of the national population, blacks were 29% of those omitted from the uncorrected count. The undercount rate for Hispanics was even higher: 5.2%. About 1.25 million Hispanics were missed by the uncorrected enumeration; Hispanics, constituting 9% of the national population, were 24% of the total uncounted. The undercount rate for American Indians was 5.0%, for Asian/Pacific Islanders 3.1%. PX 478.

In general, undercounting was concentrated in areas where minorities are concentrated—in California, Texas, Florida and other states of the Southwest and South and in major cities across the country. The state with the highest percentage minority population in the continental United States, New Mexico, had the highest undercount rate, 4.5%. The undercount rate in California of 3.7% reflected the omission in the uncorrected count of over one million people in the

state, nearly 200,000 of them in Los Angeles alone, which had an undercount rate of 5.1%. In Texas, with a statewide undercount rate of 3.2%, more than 500,000 people were missed. In Houston alone, with an undercount rate of 5.0%, more than 85,000 people were missed. In Florida as a whole the undercount rate was 2.6%; in Miami, it was 4.6%. Undercounts well above the national average were also found in the big cities of the Northeast, Mid-Atlantic and Midwest, including New York (3.0%), Chicago (2.6%), Detroit (3.5%), Baltimore (4.7%) and Washington, D.C. (5.0%). By contrast, the PES results showed that the disproportionately white populations of the Great Plains, Midwest and Northeastern (especially New England) states tended to be fairly well covered by the uncorrected enumeration. *Ibid.*

The PES results showed too that the uncorrected census counts led to a malapportionment of the House of Representatives, with two seats erroneously assigned to Wisconsin and Pennsylvania that should in fact have gone to California and Arizona, respectively.

The use of a fixed formula that apportions congressional seats based on state population—the "method of equal proportions" required by 2 U.S.C. § 2—makes it possible to determine precisely the consequences of using the uncorrected enumeration for the apportionment of the House, that is, for the allocation of political representation *among* states. Similar exactitude cannot obtain in describing the consequences for the drawing of district lines *within* states, whether for congressional or state legislative seats, because those lines are typically the product of political negotiations rather than automatic formulas. But the general effect is clear. The concentration of undercount among minority populations means that when the uncorrected enumeration is used for redistricting disproportionately minority districts are systematically overpopulated. The consequence, when that effect occurs throughout a state, is to reduce the number of

districts likely to be represented by minorities and thus the amount of representation accorded to minority residents of the state.

Plaintiffs presented evidence at trial demonstrating the effect of that pattern. Tr. 1199-1208. Looking at California congressional districts actually drawn using uncorrected 1990 census data, one sees that the highest undercount is consistently recorded in districts with heavily minority populations, with the highest undercounts in South Central Los Angeles and Watts, and the lowest undercount in districts with non-minority populations, such as the middle-class suburbs. Tr. 1200-1203. The result is that for congressional districts, each of which is supposed to have virtually the same population, there is in fact a marked disparity. Minority districts are overpopulated by about 4 to 5 percent, while non-minority districts are underpopulated by about 2 to 3 percent. Tr. 1207. In the case of California's congressional districts, the special masters who drew the district lines intended that the districts have a population variance of only one-half of one percent. Tr. 1207-1208. Thus, the effect of the differential undercount left uncorrected in the census is to disturb the effort to achieve equipopulous districts and to produce districts that deviate from equipopulousness far more than is constitutionally permissible. Tr. 1207. The same pattern of correlations between minority populations and severity of undercounting can be seen across state senate and assembly seats in California. Tr. 1203; PX 587; PX 588; PX 589.

6. The results of the PES—nationally and within racially and ethnically heterogeneous states such as California—accord with expectations about census coverage. The largest undercounts were recorded where minority populations are greatest. In that sense the PES results have "face validity." Tr. 1544-1545. The face validity of the PES results was one factor taken into account by the Bureau's Director, Barbara E. Bryant (who had succeed Dr. Keane in 1989), and the

members of the Undercount Steering Committee as they reviewed the results of the PES and the uncorrected census in June 1991 in order to determine whether the adjusted or the unadjusted counts were more accurate and whether the census should be adjusted. They took into account as well the general agreement between the demographic analysis estimates and PES-based figures, which accord in finding a severe undercount running through the uncorrected enumeration. As Director Bryant put it: "Two independent types of research provide estimates that the resident population of the United States is 253-254 million, not 248.7 million, as enumerated." Jt. App. 73.

In reaching their conclusion, both Dr. Bryant and the members of the Undercount Steering Committee majority stressed that the PES was planned and conducted superbly. Dr. Bryant wrote: "The quality of the 1990 Post-Enumeration Survey is excellent." Jt. App. 73. And the Undercount Steering Committee majority stated that its "conclusion is based in large part on [the] finding that the post-enumeration survey is a measurement instrument of unusually high quality." PX 54 at 2.

The Bureau's leadership was able to arrive at those conclusions because the potential sources of error in the PES had been painstakingly established by the Undercount Research Staff during the 1980's and the actual levels of error in the PES had been thoroughly calibrated by the extensive series of evaluation studies—the "P-projects"—conducted by the Bureau as an application of the adjustment standards that had been developed since 1987. PX 540A. Those studies showed that each of the measurable sources of error had been controlled, leaving survey results that could reliably be used to adjust. Tr. 646-650.

The Bureau reached the conclusion that missing data were not a problem in the PES by carefully studying the effects of using alternative imputation models to deal with missing data

in generating the adjusted counts. PX 540A.1. That study—PES Evaluation Project P1—demonstrated that there was an extremely low level of missing data in the 1990 PES and that its impact on the PES estimates was small. Tr. 649, 1338, 1561-1562.

The Bureau used expert rematching to test the quality of clerical matching in the production PES. The Bureau's study—PES Evaluation Project P7—showed that matching error in the PES was not a serious source of bias and was accurately measured. PX 540A.7; Tr. 649-650. Together, the problems of missing data and matching error had been the major technical problems that had confronted the 1980 PEP.

Other, less problematic sources of potential error were also closely monitored. Evaluation Project P4 explored misreporting of census day address, typically a problem for respondents who have moved between Census Day and the day of the PES interview, and found that the impact of aggregate error attributable to misreporting on the overall PES was insignificant. PX 540A.4. Fabrications were found to be minimal in Project 5a, which was designed to explore the rate of fabrications in the PES through evaluation follow-up of a large sample of PES blocks. PX 540A.5a. The effect of errors in classifying erroneous enumerations in the E-sample was examined in Project P9a, which used follow-up reinterviews and also led to the conclusion that error from that source was of minimal consequence. PX 540A.9a. Project P11 confirmed that the selection of matched sets of E-sample and P-sample blocks with comparable search areas for matches of cases had controlled error relating to balancing of the P- and E-samples. PX 540A.11.

Unlike other errors, correlation bias cannot be measured directly. But the Bureau's design of the PES controlled correlation bias by ensuring that it could affect the PES in only one way—*by leading to an underestimation of the extent of undercount*. The Bureau also designed the PES to reduce

correlation bias through post-stratification. Project P12 analyzed the success of the post-stratification in achieving a reduction in correlation bias. PX 540A.12. Based on the results of Project P12, the Bureau concluded that the post-stratification had been effective. PX 55 at 17-19.[12]

The final source of error affecting the PES figures is random (sampling) error. Because it is based on a sample, the PES is inevitably affected by sampling error, but the effect of that source of error is reduced by smoothing. Tr. 514-515, 813-817.

The Bureau accumulated the measurements of PES error into a single "total error model." PX 540A.16. The Bureau was then in a position to gauge the combined effects of all PES errors, including both bias (systematic, or non-random, error) and variance (non-systematic, or random, error), on the accuracy of the population figures generated by the dual

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[12] Summarizing the Bureau's findings, Director Bryant wrote: "[The p]rofessional judgment of the majority of the Census Bureau's Undercount Steering Committee is that the probability of having been counted or not in the census is sufficiently homogeneous among block parts [the relevant unit of analysis for Project P-12] within post-strata to support adjustment." Jt. App. 85-86. The United States says, U.S. Br. 13, that in Project P-12 the Bureau found (in the Secretary's interpretation) "significant *heterogeneity* by state within post-stratum for well over 80% of the post-stratum groups." Pet. App. 207 (italics in original document but not reproduced in cited source). Project P-12 comprised three parts, of which the latter two are relevant here. Part two, on which the Bureau principally relied, Jt. App. 85, did *not* show significant heterogeneity, as the Secretary conceded, Pet. App. 206. Part three, designed for other purposes, involved a sample so large that, as the authors of the study point out, "trivial difference[s] will be [statistically] significant." PX 540A.12 at 2. The *significance* of the heterogeneity found in part three is *statistical significance*, which refers to the confidence with which one has estimated a phenomenon, not the size of the phenomenon: in other words, the Bureau was very confident that the heterogeneity found actually existed, but was also very confident that it was trivial.

system estimate and to compare those effects with the distortions attributable to the bias involved in the uncorrected enumeration. PX 55 at 12. The particular statistical format for making that comparison is a loss function analysis. Tr. 596-597, 925-927, 946-948.

Loss function analysis is based on the measurement of error in the uncorrected census by the PES and the measurement of error in the PES-based figures by the PES evaluation projects. Jt. App. 81. The PES results demonstrated the existence of pervasive biases in the uncorrected census. The PES results show that the census undercounts minorities far more severely than whites, and the total error model shows that correcting for the biases found in the PES figures does not seriously change that outcome. PX 540A.16. Loss function analysis confirms that, as the PES and P-Project results indicate, the adjusted counts do in fact achieve greater accuracy. Jt. App. 83.

The Bureau conducted a series of loss function analyses. In most instances, the Bureau was interested in, and its loss function analyses focused on, the proportional (rather than numeric) accuracy of counts for areas, although the Bureau did calculate numeric loss functions as well. In a series of loss functions, the Bureau calculated loss using squared and absolute[13] error, both for states and for a variety of different levels of jurisdictions and geography. The Bureau also calculated loss functions for the apportionment of the House of Representatives. Tr. 936. Every loss function performed by the Bureau has shown that the adjusted counts are expected

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[13] In raw calculation, loss is expressed with a positive or a negative sign. To aggregate loss, and prevent losses in opposite directions from cancelling, the absolute value (disregarding sign) may be used, or loss may be squared (resulting in a positive sign). Squaring emphasizes the effects of large errors. Tr. 936.

to have significantly less loss than do the unadjusted counts. Tr. 949, 969-970.

In the penultimate loss function analysis completed by the Bureau before the Secretary's decision on adjustment, the ratio of squared error loss for the unadjusted counts to squared error loss for the adjusted counts is at least ten to one. Tr. 950-951; PX 43 at 11290. In that loss function, the adjusted counts have substantially less loss for all levels of aggregation and geography—counties of 500,000 or more; counties of 200,000 or more; counties of less than 200,000; non-metropolitan areas in counties of less than 200,000; metropolitan areas in counties of less than 200,000; metropolitan areas in counties of 500,000 or more; metropolitan areas in counties of 200,000 or more; non-metropolitan areas in places of 25,000 to 49,999; non-metropolitan areas in places of less than 25,000; metropolitan areas in places of 500,000 or more; metropolitan areas in places of 50,000 or more; metropolitan areas in places of 25,000 to 49,999; and metropolitan areas in places of 25,000—with a single exception. The exception—the only areas for which that loss function analysis shows the unadjusted counts more accurate—is non-metropolitan areas in places of more than 50,000. There are five such places in the United States, and they contain 60,000 people in total. Tr. 957-959; PX 43 at 11294-11295.

A subsequent loss function analysis, the last completed by the Bureau before the Secretary's decision, reflects, even more starkly, the same pattern. PX 42. The analysis calculates both squared and absolute errors. The squared error loss function shows a ratio of greater loss from unadjusted counts than from the adjusted counts of at least twelve to one; the absolute loss function shows a ratio of three to one. Tr. 969-970; PX 42 at 6087, 6090. The final loss function analysis also shows that the unadjusted counts are expected, approximately, to malapportion two more seats in the House

of Representatives than are the adjusted counts. Tr. 968; PX 42 at 6086.

In their technical assessment of the accuracy of the adjusted and unadjusted counts, seven of the nine members of the Undercount Steering Committee concluded that the adjusted counts were more accurate than the unadjusted and that the census should be corrected on the basis of the PES. PX 54 at 1-2. Two members of the Undercount Steering Committee dissented, concluding that the adjusted counts had been shown to be more accurate only for certain purposes and for certain groups (and to that extent the minority joined in the conclusion that adjustment would be proper for those purposes and groups) but that additional study would be necessary to determine whether adjustment represented an overall improvement. PX 54 at 1-2. On June 28, 1991, Dr. Bryant transmitted to Secretary Mosbacher the recommendation of the Bureau that the 1990 census should be statistically adjusted on the basis of the PES to correct for the differential undercount. Summarizing the Bureau's position, Dr. Bryant wrote:

> "The PES, supported by Demographic Analysis, estimates that the resident population of the United States on April 1, 1990 was approximately 5.3 million greater than was counted in the census. The fact that both these Census Bureau research projects, including the one based on administrative records rather than census data, produce nearly the same 5 million number is strong evidence that these residents of the United States exist. Logic also supports the existence of people who cannot or will not be counted, although logic cannot confirm their numbers. In my opinion, not adjusting would be denying that these 5 million persons exist. That denial would be a greater inaccuracy than any inaccuracies that adjustment may introduce."

Jt. App. 84.[14]

C. The Secretary's Decision

1. On July 15, 1991, the Secretary rejected the Bureau's findings and the Director's recommendation and announced his decision against adjustment. The Secretary acknowledged that the unadjusted counts were affected by a substantial undercount, differential by race and ethnic origin, which adjustment would correct. Pet. App. 138-139, 200. He acknowledged too that the Bureau's analyses showed adjustment would improve numeric accuracy (absolute numbers) for States and local areas, Pet. App. 147, 184-185, 201,[15] and would improve distributive accuracy (proportional numbers) for places containing two-thirds of the national

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[14] Petitioners point out that in 1992 the Bureau revised the PES-based adjusted counts. U.S. Br. 18, Wisc. Br. 11. The revision lowered the estimate of overall national undercount from 2.08% to 1.58%. After explaining the 1992 revision, Director Bryant writes:

> If [Secretary] Mosbacher had decided to adjust the census on [July 15, 1991], these errors meant that we would have added slightly more people to the population than we should have. But even so, the adjusted numbers would have been closer than the census count to our best estimate of the "true" population in an environment where "truth" can never be precisely determined.

B. Bryant, *Moving Power and Money: The Politics of Census Taking* 165 (1995). The revision actually shows the differential undercount to have been *worse* than found in the 1991 PES figures. While the overall national undercount rate was reduced by .50%, the undercount rate for non-blacks dropped by .51%, the undercount rate for blacks by .39%, and the undercount rate for Hispanics by .28%. Thus the black/non-black differential went up .12, and the differential between the Hispanic and overall national undercount rates went up .22. *Id.* 164.

[15] The Secretary cautioned that, in his view, that conclusion "ha[d] not been definitively demonstrated." Pet. App. 201.

population, Pet. App. 141-142.[16] He conceded "the census' imperfections", Pet. App. 165, and "[t]he fact that the PES was generally a high quality survey", Pet. App. 181.

2. The Secretary reported a "diversity of opinion among my advisors." Pet. App. 140. He noted that "[t]he Special Advisory Panel split evenly as to whether there was convincing evidence that the adjusted counts were more accurate." *Ibid.* The Secretary did not explain that the Bureau's Director had recommended adjustment, that a majority of the Undercount Steering Committee had agreed that the adjusted data were more accurate nationally and at all levels and that even the committee's two dissenters favored *some* adjustment.

Nor did the Secretary explain that the four-four split in the Special Advisory Panel reflected the circumstances of its creation: the four members nominated by plaintiffs, including Dr. Wolter (who had opposed adjustment in 1980), recommended adjustment; the four members selected by the Secretary recommended against. One of the Secretary's four appointees, William Kruskal, later explained that the Secretary had chosen "people who were known to tilt against" adjustment and that the eventual four-four split was "in the

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[16] The United States attempts to retract the Secretary's concession with the argument that the two-thirds figure was based on an early Bureau estimate subsequently corrected to take into account an assumed increase in the variance of the PES. Thus, the United States writes, "the original loss function analysis substantially overstated the accuracy of the adjusted data." U.S. Br. 32 n.24. That is not so. High relative under- and overcounts were concentrated disproportionately in large States, notably California and Texas. Assuming an increased variance, as the Bureau did, left unaffected the conclusion that the corrected counts were substantially more accurate than the uncorrected. Deposition of Howard Hogan ("Hogan Dep.") 395-396; PX 643. The Undercount Steering Committee, PX 54, Addendum at 4; DX 1 at 915, explained to the Secretary *both* their tests of increased variance *and* their explanation that those tests continued to show the superior accuracy of the adjusted counts.

cards" from the Panel's inception, Deposition of William Kruskal, at 39-40. Another, Michael McGehee, had noted to his three co-nominees, early in the Panel's existence, that they were working for the "cause against adjustment," PX 240. The Panel member upon whose work the Secretary most heavily relied was Kenneth W. Wachter.[17] Dr. Wachter's nomination was recommended by a faculty colleague, David Freedman, who had been hired by the Department as a consultant in the spring of 1989 and who continued to advise

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[17] In his decision against adjustment the Secretary repeatedly rejected as unconvincing the Bureau's own analyses of the PES and the adjusted figures and found persuasive analyses performed by Dr. Wachter, whose work was conducted without contribution from or guidance or review by the Bureau. Tr. 1852-1853; Deposition of Charles D. Jones 185-186; Hogan Dep. 152. When Dr. Wachter speculated that adult black males missed by both the unadjusted census and the PES might be located in parts of the country other than those in which the PES had found high undercounts of adult black males (central cities across the nation and the rural South), the Secretary found that speculation more plausible than the Bureau's assumption that the missing adult black males were located in the same areas as adult black males who *had* been counted. Pet. App. 160-162. To the Secretary's mind, the Bureau's extensive analyses of the effects of missing data on the PES proved less compelling than Dr. Wachter's demonstration that less plausible assumptions than the Bureau made would have yielded different results. Pet. App. 170-171. The Bureau's two evaluation projects that analyzed heterogeneity were deemed irrelevant; only experiments conducted by Dr. Wachter with the assistance of a single graduate student, Tr. 2216-2222, provided what the Secretary considered probative evidence on the question of heterogeneity. Pet. App. 211. The Bureau's analyses of the effects of imputation in the PES yielded to another test run by Dr. Wachter. Pet. App. 218. The Bureau's development of smoothing was called into question by "serious concerns" raised by Dr. Wachter. Pet. App. 222, 226. Where Dr. Wachter and the Bureau's Director disagreed about the effects of adjustment on future census participation, Dr. Wachter's views were accepted, the Director's were "unpersuasive." Pet. App. 234. At every point, Dr. Wachter provided findings that contradicted the Bureau's own and were interpreted by Dr. Wachter and the Secretary as raising doubts about the adjustment process.

the Department through the trial of this action. Tr. 2345, 2466, 2469.[18]

3. In his decision, the Secretary devoted the bulk of his attention to guideline one. In discussing that guideline, the Secretary made three critical choices, all of them reflected but not all of them explicated in his decision. First, he decided that evidence of numeric accuracy was "not relevant" to the adjustment decision; second, he considered comparisons of the distributive accuracy of the unadjusted and the adjusted counts without regard to whether the comparisons bore on actual uses of census data; third, in making those comparisons, he treated every error as equivalent, regardless of the size of the error.

The Secretary stressed his choice of distributive rather than numeric accuracy as a critical factor in his decision, Pet. App. 182-184; in fact, that was not a point in controversy.[19]

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[18] Assuming *arguendo* that plaintiffs' nominees were just as close-minded as the Secretary's, it is still the case that the Secretary failed to explain why a deadlock that was preordained had any bearing on the merits of his decision.

[19] Only after it became apparent that a PES-based adjustment would improve numeric accuracy did the Department of Commerce announce that distributive accuracy was both central to the adjustment question and unrelated to numeric accuracy. In the press release that supplies the only articulation of its 1987 decision against adjustment, the Department did not contend that adjustment might degrade distributive accuracy—only that the unadjusted census was expect to achieve such a high level of *numeric* accuracy that adjustment would be unnecessary. PX 475. When the Department published the guidelines in 1990, it still had not discovered the centrality of distributive accuracy: not only is there no reference to distributive accuracy in the guidelines or their explanations, but the explanation accompanying guideline one requires a comparison of the accuracy of the adjusted and unadjusted counts at, *inter alia*, the national level. Pet. App. 152. Comparison at the national level is, of course, a comparison of the respective numeric accuracy of the two counts—the very comparison that the Secretary the following year found to be "not relevant" to the decision on adjustment. Pet. App. 184, 201.

The Bureau's long-standing concern with differential undercount, the concern that had actuated development and implementation of the PES and that informed the Bureau's preference for the corrected data, was a concern that the uncorrected counts led to misallocation of representation and funding. Jt. App. 79. Thus, the Bureau's fundamental concern was with distributive accuracy. Moreover, the Bureau presented its conclusion that the adjusted counts achieved superior accuracy in terms of both numeric and distributive improvement. Jt. App. 80. But the Bureau regarded evidence of improved numeric accuracy as bearing on the question of improved distributive accuracy; the Secretary, by contrast, regarded evidence of superior numeric accuracy as "not relevant" to the determination of distributive accuracy. Pet. App. 201. The Secretary's decision, which represents the only time that a decision about how best to achieve an accurate census has been removed from the Bureau, also represents the only time that decision has been made without regard for numeric accuracy. Every other decision made to improve the accuracy of the counts—including all of the methodological innovations discussed above—has been justified by the Bureau in terms of increased numeric accuracy. That approach does not mean that the Bureau rejects the distributive accuracy of the census as the ultimate criterion of improvement. Rather, the Bureau has chosen to introduce innovations to maximize numeric accuracy because it has always recognized that improving numeric accuracy is the clearest way to improve distributive accuracy. A census that achieves perfect numeric accuracy also achieves perfect distributive accuracy.

Distributive accuracy involves comparing the relative accuracy of the census count for different areas. It makes sense as a concept separate and apart from numeric accuracy only if comparisons are made that are related to the uses of census data—for determining apportionment, intra-state redistricting and the allocation of federal funds. While the

Secretary asserted that he was focusing on distributive accuracy because he was concerned with the uses of census data, his approach to distributive accuracy was unrelated to those uses. The Secretary considered whether improved distributive accuracy had been definitively demonstrated for groups of places, regardless of whether those places compete directly for representation, funding or anything else. For example, the Secretary cited the results of a Bureau loss function analysis of distributive accuracy for the 23 cities in metropolitan areas of 500,000 or more. Pet. App. 191. That analysis examines gains and losses for the cities in terms of their shares of the national population residing in those 23 cities. The question addressed by the analysis is *not* the same as the question of whether each city showed improved distributive accuracy *vis-a-vis* the national population or improved distributive accuracy *vis-a-vis* the State of which it is a part, analyses intimately connected to the issues of representation and funding. The Secretary's focus was on the question of whether, for example, Chicago's population was being counted more accurately just in comparison to places such as Los Angeles and San Diego, a comparison with no relevance whatsoever to any constitutional or statutory use of the census; the Secretary was ignoring the increased accuracy of Chicago's population as a share of the national total and a share of Illinois.

In the same vein, the Secretary relied on what he termed an absence of "direct evidence" for improvement of distributive accuracy with respect to places of under 100,000 population. Pet. App. 192. Those analyses would have compared places of under 100,000 population with one another—not with the national population, nor with the States of which the places are parts. In practical terms, the Secretary decided that evidence of improved accuracy for White Plains, N.Y. *vis-a-vis* Ashtabula or Sioux City was more important than evidence of improved accuracy for White Plains as a part of the nation or as a part of New York State. And again, no

constitutional or statutory justification for that preference was, or could have been, offered.

In his approach to distributive accuracy, the Secretary also disregarded the sizes of errors; thus, in the Secretary's analysis, large gains in accuracy (with significant practical consequences) could be offset by small losses in accuracy (with little or no practical significance). Tr. 1002, 1071; Hogan Dep. 258-259. Bureau analyses had demonstrated that adjustment would have the greatest impact and would do the most good in States with especially high undercounts, such as California, or especially low undercounts, such as Wisconsin. Tr. 1012-1014. For those states where the results of adjustment would be less certain to increase distributive accuracy—states with average undercounts—the impact of adjustment on apportionment, redistricting and funding would be minimal. *Ibid.* The Bureau's loss function analyses, like the rest of its work, had focused on aggregate loss, giving more weight to proportionally large errors than to proportionally small ones. PX 54; PX 643; Tr. 1075; Hogan Dep. 395-396. The Secretary, looking simply at the total number of States, cities or other areas with *any* error, disregarded that approach. Tr. 1000.

Specifically, the Secretary relied on a Bureau loss function analysis that he interpreted as showing that, with an increased estimate of PES sampling error, adjustment would decrease distributive accuracy for 28 or 29 States. Pet. App. 142; PX 54, Addendum at 4. In so doing, he treated all errors as if they were of the same magnitude. Tr. 1000. But many of the states that the Bureau's analysis treated as worsened by adjustment would in fact be virtually unaffected: adjustment would have changed their shares of the national population too little for any practical impact in terms of representation, funding or anything else. Tr. 1022. The Secretary ignored the Bureau's finding that the places improved by adjustment contained the great majority of the nation's population. *Supra*,

pages 35, 36 & n.16. His approach ignored as well the constitutionally primary purposes of the census and the indisputable improvement in census accuracy adjustment was shown to have for those purposes.

The National Academy of Sciences had explicitly warned against an approach such as the Secretary's, in which the sizes of errors are ignored. PX 2 at 282; *see also* Tr. 767, 1163. In the weeks before his decision the Bureau, addressing the same point, twice cautioned the Secretary that the "[i]ntuition that the break-even point is when half the states [are improved] and half [are worsened] is *not* correct." PX 54, Addendum at 4; *see also* PX 41 at 3217. At trial, Dr. Freedman conceded that the Secretary's approach was "borderline unreasonable". Tr. 2507. On appeal, the United States, citing Dr. Freedman's testimony, admitted that the Secretary's approach was "not a good way" to analyze distributive accuracy. Fed. App. Br. 47 n.16. The same error affects all of the Secretary's conclusions about the Bureau's loss function analyses, including the comparison of the 23 cities in metropolitan areas of more than 500,000 population; the concession that his approach was invalid is a concession that all of his findings concerning the comparative accuracy of the adjusted and unadjusted counts flowed from an invalid approach to comparisons of distributive accuracy.

Although the United States now concedes that "the adjustment was in large part proposed to remedy the disproportionate undercount of minorities", U.S. Br. 17 n.14, the Secretary never acknowledged that that was the purpose for which the PES was conducted nor that it had fulfilled that purpose. By the Secretary's own account, the prospect of ameliorating the differential undercount played little role in his decision.

D. Prior Proceedings

1. Upon announcement of the Secretary's decision, the *City of New York* plaintiffs resumed active litigation, challenging the decision as violative of equal representation rights under the Constitution, Art. I, § 2, cl. 3 (as amended by the Fourteenth Amendment, § 2) and the Fifth Amendment. The culmination of that challenge was a thirteen-day trial. Plaintiffs presented testimony by, among others, the four special advisory panel members they had nominated, including Dr. Wolter, and by Dr. Bailar. Defendants presented testimony by one Bureau statistician, Robert Fay,[20] and one other Bureau employee, Peter Bounpane; the crux of defendants' case, however, was presented by three retained experts, Drs. Freedman, Wachter and Paul Meier.

At the outset of its opinion, after summarizing the evidence of undercount in the uncorrected census and the accuracy of the adjusted data, the district court concluded: "This Court is satisfied that for most purposes the PES resulted in a more accurate—or to be statistically fashionable, a less inaccurate—count than the original census." Pet. App. 59. The court then turned to the question of whether, in

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[20] The focus of Dr. Fay's testimony was his account of a paper he was then writing in which he argued the variance of the adjusted census counts might be twice what the Bureau had estimated in June 1991. Tr. 1915. But the Bureau had taken that possibility into account in reaching its conclusion that the adjusted counts were more accurate. PX 54 at 6-7, App. 6 at 5. Loss function analysis demonstrates that, even if one assumes the levels of variance proposed by Dr. Fay, the adjusted counts are much more accurate than the unadjusted. Tr. 1019-1021. Dr. Fay's more general point, as implied by the United States' summary that he "no longer advocated *the adjustment recommended by the Committee*", U.S. Br. 38 (citing Tr. 1920-1921) (emphasis supplied), was that, after an additional year of research, he believed other adjustments of greater accuracy could be made.

light of that finding, the Secretary's decision might nonetheless be upheld.

At the heart of the district court's decision lie a pair of determinations, the joint effect of which was to accord the Secretary a double measure of deference. First, the court deemed itself empowered to review the Secretary's decision only to the extent of determining whether the Secretary had been arbitrary or capricious. Pet. App. 89-91. Citing the writings of Montesquieu and Locke, the Massachusetts Constitution of 1780 and *The Federalist* No. 72 (Hamilton), the court found that a proper concern for the separation of powers dictated a limited "role [for] the judiciary . . . when the controversy relate[s] to the management of the government." Pet. App. 89. The court implicitly found that "judicial intrusion" in such a controversy is available only under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and then only "when the administrative decision abuses reason." Pet. App. 90; *see also* Pet. App. 69. Second, the court tested the reasonableness of the Secretary's decision only in terms of his application of the guidelines. In discussing each of respondents' objections to the decision, the court examined only whether the Secretary had reasonably applied a guideline to support his conclusion. Pet. App. 71-89. The court did not consider whether the Secretary's decision was arbitrary or capricious other than as an application of the guidelines, nor did the court consider whether the Secretary's decision (whether viewed as an application of the guidelines or otherwise) was constitutional.

Indeed, although the district court discussed the Constitution preliminarily as the source of the requirement that "the census . . . be as accurate as practicable", Pet. App. 67, the court did not thereafter refer to the Constitution, with two minor exceptions: first, the court concluded that "[t]he Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal

of assuring the most accurate census practicable", Pet. App. 77; second, the court summarily stated: "I . . . find that the Secretary's decision not to adjust the 1990 census does not violate the APA, the Constitution, the [1989] Stipulation, or any statute", Pet. App. 94. No further analysis or reference supported that summary statement.

Given its conclusions regarding the deference to be accorded the Secretary, the court determined that his rejection of adjustment was entitled to be upheld, despite the court's own conclusion that adjustment would improve the accuracy of the census. The court explained the connection between the standard of review it adopted and the result it reached:

> "The breadth of the guidelines left the Secretary enormous discretion. Plaintiffs have made a powerful case that discretion would have been more wisely employed in favor of adjustment. Indeed, were this Court called upon to decide this issue *de novo,* I would probably have ordered the adjustment. However, it is not within my province to make such determinations. The question is whether the Secretary's decision not to adjust is so beyond the pale of reason as to be arbitrary or capricious. That far I cannot go."

Pet. App. 89 (footnote omitted). The court reiterated later: "While plaintiffs' counsel has illustrated that adjustment is statistically feasible, and would improve the quality of the counts for most purposes while ameliorating the profoundly disturbing problem of differential undercount, the Court cannot, on the record before it, supplant the Secretary's decision." Pet. App. 94-95. And the court observed that "plaintiffs have made a compelling attack on the [Secretary's] *Decision*, and the Secretary has conceded that the objective criteria used to measure the adjusted counts show a greater numeric accuracy at the national level and that the Census

Bureau estimates of distributive accuracy marginally favor the adjusted counts . . ." Pet. App. 77.[21]

No fair reading of the court's opinion supports the United States' statement that the district court's decision was "enigmatic" in its findings on the relative accuracy of the two counts. U.S. Br. 44. The United States has extracted from its context the second of two sentences from the opinion. The district court wrote:

> "Plaintiffs' attack on the Secretary for subjecting the tests favoring adjustment to unrealistically rigorous scrutiny misconstrues Guideline One, which clearly states that '[t]he Census shall be considered the most accurate count of the population of the United States, at the national, state, *and local levels, unless an adjusted count is shown to be more accurate.*' [Citation omitted.] Thus, plaintiffs' failure to illustrate affirmatively the superior accuracy of the adjusted counts either (1) at any level mentioned in Guideline One, or (2) for any reasonable definition of accuracy, is sufficient to support a finding that Guideline One favors use of the original census counts."

Pet. App. 78 (emphasis supplied by the district court in its 1993 opinion). The court's point was that guideline one required an affirmative showing of superior accuracy of the adjusted counts at every level and for every reasonable definition of accuracy; if plaintiffs failed at any hurdle, their success in passing all the others would be insufficient to save their cause. The court was not saying, as the United States'

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[21] It is clear in context that the district court did not endorse the Secretary's conclusion that the Bureau's estimates of distributive accuracy only *marginally* favored the adjusted counts; the court was describing the extent of the Secretary's concession. It is also clear that that concession was made even after taking into consideration a higher estimate of variance in the PES than originally assumed by the Bureau. *See* Pet. App. 74.

selective quotation of only the last sentence of that paragraph is meant to suggest, that there was no level and no definition of accuracy for which plaintiffs had proved the superior accuracy of the adjusted counts. On the contrary, the court had already explained that it was satisfied adjustment would improve the accuracy of the census counts "for most purposes."

The court's conclusion that guideline one supported the Secretary's decision rested on two elements of that guideline: its presumption against adjustment, and its requirement of demonstrated increases in accuracy at local levels. The latter element, as the court understood it, meant that the Secretary could properly focus attention on the absence of "direct evidence," as he saw it, for improved distributive accuracy for places of under 100,000 in population, *regardless of whether that analysis had any bearing on the constitutional uses of census data.* The presumption, in turn, meant that, even if the weight of the evidence demonstrated affirmatively that adjustment would otherwise improve distributive accuracy, the Secretary's residual uncertainty about any aspect of the comparison between the adjusted and the unadjusted counts was a sufficient basis for his conclusion that the unadjusted counts were more accurate.

In short, the court found that the adjusted counts were more accurate but determined that the Secretary's decision against adjustment nonetheless constituted a non-arbitrary application of the Secretary's own guidelines.

2. On appeal, plaintiffs argued that the district court had adopted the wrong standard for review of the Secretary's decision. Plaintiffs contended that the Secretary's decision affected constitutional rights, because the differential undercount had been shown to result in a malapportionment of the House of Representatives and to affect intra-state redistricting, and that the district court's deferential review of the decision was therefore erroneous.

The court of appeals agreed with plaintiffs that the lower court had erred in the deference it accorded the Secretary. The court of appeals reasoned that, since plaintiffs had shown that the adjusted data are more accurate and that the failure to correct therefore deprives citizens of equal votes by diluting the voting strength of residents of areas with high undercount, the Secretary's decision was to be reviewed under a line of analysis that begins with *Baker v. Carr*, 369 U.S. 186 (1962), and continues through *Karcher v. Daggett*, 462 U.S. 725 (1983). Pet. App. 26-31. That line of cases, according to the court of appeals, (1) requires that, as near as practicable, one person's vote must be worth as much as another's; (2) holds that the right to vote is impaired by dilution as well as by complete disenfranchisement; and (3) imposes upon *States* the obligation to make a good-faith effort to achieve the goal of one person, one vote. Pet. App. 31. The court of appeals concluded that the same reasoning applies, *mutatis mutandis*, to *federal* decisions bearing on equality of representation. Because of separation of powers considerations, the court of appeals determined, *de novo* review would be inappropriate. Pet. App. 34. And because of constitutional constraints, precise equality of populations in congressional districts cannot be maintained across state lines. Nonetheless, the court of appeals reasoned that recent decisions of this Court, including *United States Department of Commerce v. Montana*, 503 U.S. 442, 463-464 (1992), and *Franklin v. Massachusetts*, 505 U.S. 788, ___, 112 S.Ct. 2767, 2777 (1992), teach that a good-faith effort to achieve equality of voting power as nearly as is practicable is required of federal officials in the discharge of responsibilities to conduct and report the census. Pet. App. 34-35.

Applying *Karcher*, the court of appeals held that the burden was initially on plaintiffs to show that the Secretary had failed to make a good-faith effort to achieve a census as accurate as practicable. Pet. App. 36-37. The court held that plaintiffs had met that burden by demonstrating that the

adjusted counts were more accurate, especially with respect to alleviating the differential undercount of minorities, and by showing that the Secretary had declined to adopt the more accurate adjusted counts because he remained uncertain about distributive accuracy at some smaller geographic levels. Pet. App. 38-39.

Following *Karcher*, 462 U.S. at 740, the court of appeals concluded that plaintiffs' proof sufficed to shift the burden to the Secretary to show that use of the less accurate unadjusted census data "(a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective." Pet. App. 37, 40. The court of appeals remanded the case to permit the Secretary to essay that demonstration.

SUMMARY OF ARGUMENT

Petitioners argue that the court of appeals erred in analyzing the case as one involving fundamental constitutional rights and in following *Karcher* and its antecedents to establish a framework for analysis; petitioners all believe that this case ought properly be analyzed under *Franklin* to determine whether the Secretary's decision was "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 112 S.Ct. at 2777. *See* U.S. Br. 28-32, Wisc. Br. 18-21, 45-46, Okla. Br. i. While the court of appeals was correct, its choice has none of the consequences petitioners suppose; application of the *Franklin* standard leads to the same result as that reached by the court of appeals.

1. The Secretary's decision cannot be justified as "consistent with . . . the constitutional goal of equal representation." In determining which set of census data was more accurate, the Secretary ignored evidence that the adjusted data achieved superior numeric accuracy as irrelevant to the question before him, even though the superior numeric accuracy of the adjusted counts is related, as the Bureau

concluded, to the counts' superior distributive accuracy. The Secretary selected for his comparisons the criterion of distributive accuracy, a selection based on his concerns about the uses of the census data, but he then applied that criterion in ways having nothing to do with uses of the data. He emphasized comparisons having no justification in any constitutional or statutory purpose for which the census is conducted; he treated small errors having little or no impact on those uses as the equivalent of large errors having considerable impact on those uses. After all of those maneuvers, the Secretary achieved a quantum of doubt about the superior distributive accuracy—a quantum that, though unrelated to any uses of census data, allowed the Secretary to invoke the presumption of guideline one and declare the unadjusted counts to be of superior accuracy at all geographic levels and for all purposes. That approach to resolving the question of how best to maximize census accuracy is entirely different from an approach that, without presumptions or artificial analyses or comparisons unrelated to uses of the data, seeks to determine which set of data is more accurate for the purposes for which census data are used. When the district court undertook the latter inquiry, it had no difficulty concluding, as did the Bureau, that the adjusted data were more accurate. The Secretary's contrary approach cannot satisfy the obligation imposed on him by *Franklin*.

2. The court of appeals' analysis leads to the same result. *Karcher* and its antecedents define an obligation of good-faith effort to achieve equality of voting power that the Constitution imposes upon State and local officials. *Montana* supports application of that same obligation to federal actors, though absolute equality of representation between States is precluded by constitutional barriers. The analytic framework of *Karcher* applies to this case. As the court of appeals determined, plaintiffs have shown that the Secretary's decision reflected the absence of a good-faith effort to achieve equality as nearly as practicable. The United States' contention that the

Secretary proceeded in good faith rests on the assumption that the Secretary's decision can be understood as a neutral finding, free of presumptions or artificial analysis, that the unadjusted counts are more accurate for the purposes for which census data are used. The assumption cannot be supported. Moreover, the absence of good faith is readily shown by the context and content of the Secretary's decision.

ARGUMENT

I. THE SECRETARY'S DECISION IS NOT CONSISTENT WITH THE CONSTITUTIONAL LANGUAGE AND THE CONSTITUTIONAL GOAL OF EQUAL REPRESENTATION

The United States asserts that "[t]he Secretary's decision not to undertake an adjustment of the 1990 census figures rested primarily on three determinations[: (1)] . . . that distributive rather than total numeric accuracy should be of paramount importance . . . [; (2)] that, in making his decision, the unadjusted census figures would 'be considered the most accurate count of the population of the United States, at the national, State, and local level, unless an adjusted count is shown to be more accurate.'[; and (3)] that the adjusted figures had not been shown to improve distributive accuracy and that adjustment was therefore not warranted." U.S. Br. 28-29 (footnote omitted). The United States further contends that "[t]he first two determinations are matters of policy that a court may review to the extent of determining whether they are 'consistent with the constitutional language and the constitutional goal of equal representation.'" U.S. Br. 29 (quoting *Franklin*, 112 S.Ct. at 2227). The third determination, according to the United States, "is an exercise of technical judgment . . . reviewable, if at all, only under a deferential 'rational basis' or 'arbitrary and capricious' standard.'" U.S. Br. 29 (footnote omitted).

1. The claim that the Secretary made a critical determination when he selected distributive, rather than numeric, accuracy as the ultimate criterion for deciding whether the census should be adjusted is insupportable. Both the Bureau, which addressed the question of differential undercount because of concerns about its effect on distributive accuracy, and the Secretary (and, for that matter, everyone else who has ever considered the question of census accuracy) agreed that *ultimately* distributive accuracy is the goal of the census. The novelty—and the determinative core—of the Secretary's decision lies elsewhere. That decision rests on the assumption that evidence of improved numeric accuracy is *irrelevant* to determining whether distributive accuracy has been improved and on an approach to resolving questions of distributive accuracy that examines all possible comparisons, regardless of relation to uses of census data, and measures error by the number of units affected rather than the proportional sizes of the errors. The determination that numeric accuracy is irrelevant is without precedent in the history of the census.[22] Moreover, it cannot be justified as

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[22] The notion that only distributive accuracy is important and that numeric accuracy is irrelevant is so strange that the advocates who press it before this Court find it impossible to avoid contradicting themselves. The United States says, "Even a dramatic undercounting of the total population would not be inconsistent with the goal of fair apportionment if each State's share was accurately determined." U.S. Br. 30-31. In the same vein, Wisconsin writes:

> A census which achieves "true" numeric accuracy in the count of the national population has no inherent superiority over one which does not. What makes one set of numbers constitutionally superior is its ability to distribute correctly a given national population among the states. If this occurs, it is constitutionally irrelevant whether the national count is half or double its "true" level or somewhere in between.

Wisc. Br. 36. Yet both petitioners find highly relevant the Bureau's "success in counting 98.4% of the population", U.S. Br. 23; *see also* Wisc.

"consonant with, though not dictated by, the text and history of the Constitution," *Franklin*, 112 S.Ct. at 2778, *cf.* U.S. Br. 29 n.21, for the Secretary's indifference to numeric accuracy transgresses both the plain language of the Constitution, Art. I, 2, § Cl. 3, and the mechanism for representation to which that language relates.[23] The Secretary's determination of an

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Br. 5. If numeric accuracy is presumptively "constitutionally irrelevant," as petitioners claim, a count of 98.4% of the population is not presumptively "constitutionally superior" to a count of 50% or 200% of the national population. Obviously, neither petitioner really believes that numeric accuracy is completely irrelevant, and indeed it is not.

[23] The Secretary's indifference to numeric accuracy rests on the premise that "[e]ven a dramatic undercounting of the total population would not be inconsistent with the goal of fair apportionment if each State's share was accurately determined." U.S. Br. 30-31. Wisconsin puts it only slightly differently, "The same percentage distribution of the national population among the states will result in the same apportionment, regardless of the level of the national population." Wisc. Br. 36. Neither statement is true as a general proposition; neither reckons with the facts that the Constitution, Art. I, § 2, Cl. 3, requires that congressional districts have populations of no less than 30,000; that it requires that whole numbers of seats be apportioned; and that it does not express a preference for a particular method of apportionment. Thus, neither statement holds for the results of the first decennial census in 1790 and the first census-based apportionment in 1792. At that time, congressional districts close in size to the constitutional minimum (30,000) were common. For example, Rhode Island, with a population of 68,446, received two seats in the House of Representatives. *See* M. Balinski & H. Young, *Fair Representation* 158 (1982). A more severe, though evenly distributed undercount—of 13% or more—would have reduced Rhode Island's population below 60,000 and necessarily eliminated its second seat. But under the method of apportionment actually used, *see Montana*, 503 U.S. at 448-450, larger states' congressional delegations would not have been halved. New Jersey, with a population of 179,570, received five seats in the 1792 apportionment. Had an evenly distributed undercount reduced Rhode Island to one seat, no method of apportionment could have preserved the 5:2 ratio between New Jersey's and Rhode Island's delegations, since the Constitution requires allocation of whole numbers of seats. Finally, the 1792 apportionment was conducted under Jefferson's

approach to analyzing distributive accuracy is so extraordinary that it was repudiated by the United States in the court of appeals.

Distributive accuracy is an appropriate criterion for judging census accuracy because it calls attention to a concern with the uses to which census data are put. The Secretary himself invoked that justification in explaining his preference for distributive accuracy. But the Secretary's ensuing analyses of "distributive accuracy" are unrelated to any uses of census data. Nowhere in his decision does the Secretary even attempt to demonstrate that the errors created by adjustment would have adversely affected the *usefulness* of census data. In particular, the Secretary never considered which set of counts would do most to ensure fair representation. The Secretary's determination of an approach to the question of distributive accuracy—an approach conceded not to have been valid—cannot be vindicated as consistent with the constitutional goal of equal representation.

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method (the method of greatest divisors): under that method, a common divisor is first selected (in 1792, the divisor was 33,000); then, each State's enumerated population is divided by the divisor and each State's number of Representatives is the resulting whole number, fractions being ignored, *id.* at 449-450. A State would thus have eight seats if the ratio of its reported population to the selected divisor were anywhere between 8.99 and 8.00, but would fall to seven seats if the ratio dropped from 8.00 to 7.99. With the same divisor, then, a *modest*, evenly distributed undercount could alter the apportionment of seats in the House. Only under a method of apportionment such as the method of equal proportions (Hill method) is it true (and then only for congressional districts much larger than 30,000) that an evenly distributed undercount will not change the apportionment of Representatives. But that method is only one of several Congress has from time to time selected. *Id.* at 447-456. The Secretary's determination that numeric accuracy is irrelevant because equivalent distributions *always* produce the same apportionment rests on a supposed axiom about constitutional apportionment that is in fact not generally true; the Secretary's determination is not "consonant with . . . the text and history of the Constitution."

2. The Secretary's second determination, according to the United States, was to "adopt[] a working hypothesis that unadjusted figures derived from the 1990 census would be treated as the most accurate unless alternative numbers were shown to be better." U.S. Br. 31-32. The United States, *id.* 31, argues that use of that hypothesis was "consonant with, though not dictated by, the text and history of the Constitution," *Franklin,* 112 S. Ct. at 2778, "[b]ecause unadjusted headcounts had been used for 200 years". The premise of the argument is simply wrong, *supra*, pages 4-5. In any event, the census is a complex system of balancing errors that cannot meaningfully be described as a "headcount." *Supra*, pages 5-11. Moreover, what the United States must defend is not merely a presumption that the uncorrected counts are more accurate but a presumption that incorporates the Secretary's approach to distributive accuracy —and that approach is without precedent in the 200 years of the United States census, was described by the Secretary's own expert witness at trial as "borderline unreasonable," and has been deprecated by even the United States as "not a good way" of analyzing accuracy.

The United States makes two further points in connection with the Secretary's "second determination." The United States argues that the "constitutional goal of equal representation" cannot "plausibly be thought to require the Secretary to use adjusted figures that he had not found to be more accurate than the unadjusted numbers in achieving that goal." U.S. Br. 32. But the Secretary never considered analyses bearing on the superior accuracy of the adjusted counts for apportionment and districting; instead, he focused on applications of the criterion of distributive accuracy that were unrelated to any use of census data. Thus, his analysis ignored the impact of the adjustment decision on the goal of equal representation.

The United States also argues that the Secretary "affirmatively concluded" that "'evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration.'" U.S. Br. 32 (quoting Pet. App. 185). The evidence in question is the same set of analyses for states, cities and counties, Pet. App. 191, already discussed, *supra*, pages 39-42. The Secretary's "affirmative conclu[sion]" can be supported only by adoption of the approach to distributive accuracy he followed. Following any other approach, the Bureau's evidence (as the Bureau explained) supports the superior distributive accuracy of the adjusted counts.

3. The United States contends that the Secretary's "third determination"—that the adjusted data were less accurate than the unadjusted—can be reviewed only under a deferential standard because of the supposedly highly technical nature of the decision. U.S. Br. 33. The United States cites in support of that argument a series of cases restating the courts' customary hesitation to review the merits of agencies' resolutions of scientific disputes. U.S. Br. 34. Without any supportive authority, the United States then announces, "That respondents' attack on the Secretary's decision is framed as a constitutional challenge does not detract from the respect for institutional competence that underlies the rule of deference to an expert agency's technical judgments." *Ibid.*

In the first place, there is nothing highly technical about the critical question of the Secretary's approach to distributive accuracy. The Secretary himself observed that:

> "The choice of a loss function is not scientific. It is usually made on the basis of convenience or tradition."

Pet. App. 188. The United States concedes that the Secretary's choice of an approach to distributive accuracy as the basis for his interpretation of the Bureau's loss function analyses is susceptible to judicial review to determine whether

it is consistent with the constitutional language and the constitutional goal of equal representation. If his approach cannot be so supported, the Secretary's "working hypothesis" concerning the superiority of the unadjusted counts is insufficient to support a conclusion that the unadjusted counts are more accurate under any different approach to distributive accuracy. At the very least, then, the remand ordered by the court of appeals would be appropriate to permit the Secretary to redetermine the comparative accuracy of the two counts under a constitutionally permissible definition of distributive accuracy.

In the second place, the United States has offered neither authority nor justification for the radical conclusion that at a certain level of technical complexity issues of constitutional magnitude may be determined by agencies and then shielded from all but deferential judicial review. None of the five cases cited by the United States for the proposition that courts must defer to technical determinations by federal agencies, U.S. Br. at 34, involved constitutional claims. All arose under federal statutes—the APA and the National Environmental Policy Act of 1969—that authorize only limited judicial review of agency decisions.[24] Where a claim arises under the Constitution,

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[24] Four of the cited decisions explicitly identify the APA, 5 U.S.C. § 706(2)(A), as both the source of and the limitation on the court's power to review the agency's action. *Thomas Jefferson University v. Shalala*, ___ U.S. ___, 114 S.Ct. 2381, 2386-2387 (1994) (interpretation by Secretary of Health and Human Services of agency regulations governing Medicare reimbursements to teaching hospitals); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376 & n.21 (1989) (determination by Army Corps of Engineers not to file supplemental environmental impact statement); *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 90 & n.3 (1983) (Nuclear Regulatory Commission decision concerning presumed environmental impact of storage of certain nuclear wastes and application of that presumption to nuclear power plant licensing); *International Fabricare Institute v. Environmental Protection Agency*, 972 F.2d 384, 389 (D.C. Cir. 1992) (regulation of drinking water

however, neither the text of Article III nor the structure of the overall scheme of government suggests that judicial authority diminishes as the complexity of subject matter increases. Certainly the United States cites no case that intimates, much less holds, that fundamental constitutional rights are attenuated when the processes requisite for their vindication involve a degree of scientific or technical sophistication. Indeed, this Court has as readily invoked the aid of statistical analysis in addressing constitutional claims, *e.g.*, *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 697-698, 700-703 (1989); *Castaneda v. Partida*, 430 U.S. 482, 496 nn.16-18 (1977), as it has undertaken to gloss the mathematics of apportionment, *Montana*, 503 U.S. at 455-456, 461-463.

The most profound flaw in the United States' argument, however, has nothing to do with institutional relations *between* the Judiciary and the Executive and everything to do with institutional relations *within* the Executive. Resting its argument on cases reflecting judicial deference toward, for example, the expertise of the Nuclear Regulatory Commission concerning nuclear waste and the expertise of the Environmental Protection Agency concerning drinking water contaminants, the United States suggests that comparable deference is due the "technical expertise" of the Commerce Department officials who decided against adjustment. U.S. Br. 33-34. But "technical expertise" with respect to the census rests within the Bureau. The Bureau exercised that expertise in designing, implementing, reviewing and recommending use of the PES-based adjustment. The Secretary's decision, without contributions from nor review by the expert Bureau, was made in derogation of that technical expertise. Judicial

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contaminants). The fifth case, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), arose under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C), which similarly limits judicial review of agency action. 427 U.S. at 410 n.21.

review of the Secretary's decision should not be impeded by a respect for expertise that the Secretary himself overrode.

As the agency responsible for the very data underlying the allocation of political power, the Bureau has a unique place in the Executive branch. If the source of those data is tainted, the legitimacy of the allocation of power and thus of the uses of that power are called into question.

> "There is a need to protect the Bureau of the Census against politicization. The potential for polluting a highly technical, objective statistical procedure with political bias is real and the implications for congressional reapportionment and a host of Federal assistance programs could be dramatic."

The Census Reform Act: Hearings on H.R. 8871 Before the Subcommittee on Census and Population of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess. 4-5 (1977) (statement of Rep. Leach). A. Ross Eckler, who served as Director of the Bureau from 1965 to 1969, has noted that, "as a rule [the Bureau] has been given a good deal of independence in carrying out its tasks." A. Ross Eckler, *The Bureau of the Census* 129-130 (1972).

The rule changed in 1987. A scholarly account of the adjustment controversy puts it this way:

> "What was radically different about the 1990-1991 adjustment decision was that the Department of Commerce took it away from the bureau and held onto it tightly. Starting in 1987 when the undersecretary announced unilaterally that there would be no adjustment in 1990, the department retained control over the decision; the department "undelegated" it from the bureau. . . . [F]or decades census officials had been making decisions with equally weighty numerical implications. Census bureau officials had made those decisions responsibly."

Harvey M. Choldin, *Looking for the Last Percent: The Controversy over Census Undercounts* 237 (1994). Former Bureau Director Bryant, citing and agreeing with Dr. Choldin, describes the events of the period as the "[D]epartment's 'takeover' of the Census Bureau." Barbara E. Bryant, *Moving Power and Money: The Politics of Census Taking* 158 (1995).

Against that backdrop, rote invocation of the doctrine of deference to agency expertise rings hollow. The principle that resolution of "issues requir[ing] a high level of technical expertise . . . is properly left to the informed discretion of the responsible federal agencies", *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976), bears less meaningfully on judicial review of the Secretary's decision than does the principle that "expertise cannot be used as a cloak for fiat judgements." *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 926 F.2d 1206, 1211 (D.C. Cir. 1991).

The United States also argues that, absent a uniform rule of deference, cases concerning census accuracy might produce conflicting findings of fact among district courts and force appellate courts to act as fact-finders. *Id.* 34-35. The argument proves far too much. The United States itself concedes that "[t]he courts would be open to consider" a claim of "[i]ntentional undercounting of racial minorities in the conduct of the census". *Id.* 45-46. Yet such a claim, which the United States recognizes would be analyzed without a framework of deference, *id.* 46, could easily arise before different district courts, which could arrive at different resolutions based upon different findings of fact. A variety of devices—including certification of a nationwide class, Fed. R. Civ. P. 23; certification to the Judicial Panel on Multi-District Litigation, 28 U.S.C. § 1407; orders of transfer among district courts, 28 U.S.C. § 1404; and deference among courts of coordinate jurisdiction—are available to resolve such conflicts. An extraordinary new rule of deference to such agency

determinations as may be simultaneously susceptible to challenge in different districts is unwarranted.

4. As further support for its contention that the Secretary's ultimate determination concerning the accuracy of the adjusted and unadjusted data should not be overturned, the United States argues that "the formulation and evaluation of the proposed adjustment involved a series of complex processes and assumptions in a highly technical area" and that "[i]n the Secretary's view . . . the analysis tended to show that the adjusted figures were less accurate than the unadjusted count at every level from the state level down." U.S. Br. 36. It is true that the *Bureau's* work on the adjustment involved technical decisions. But it is not true that the Secretary's decision turned on technical issues. His decision turned on particular uses of the concept of distributive accuracy, uses readily susceptible to non-expert review.[25] The Secretary's "view . . . that the adjusted figures were less accurate" reflected no more than the conclusion of his flawed approach to analyzing accuracy combined with the iron presumption of guideline one.

The United States further argues that "[t]here were . . . substantial uncertainties in the record that weighed against a determination that the particular adjustment under consideration was distinctly meritorious and superior to the adjusted figures", *id.* 36, a statement developed by showing that, at several points, decisions made in planning the adjustment process could have been made otherwise and that,

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[25] It could scarcely be otherwise. Robert A. Mosbacher, the Secretary of Commerce who made and announced the decision against adjustment in July 1991, was "not a statistician," as he forthrightly put it in announcing his decision. Pet. App. 139. That the Secretary of Commerce removed the decision on adjustment from the expert agency, the Census Bureau, does not mean that the non-expert Secretary, having rejected the expert recommendation of the Bureau's director, can continue to characterize the decision as "highly technical."

if made otherwise, would have yielded different results (conceivably affecting the apportionment of the House of Representatives). The argument is premised on a *non sequitur*. Even supposing the United States to have shown that "the particular adjustment under consideration was [not] distinctly meritorious," *i.e.*, that other adjustments were possible and might even be better, it does not follow that the adjusted data in question are worse than the unadjusted data. On the question of whether an elephant is or is not bigger than a horse, one would suppose that evidence that a whale is bigger than either is not probative.

But it is a noteworthy fact about the evidence the United States cites—from Dr. Wachter's test of "five alternative adjustment calculations" through the Bureau's 1992 revised corrected figures (based on a different post-stratification and no smoothing)—that *every* approach to adjustment finds the uncorrected enumeration to have erroneously shifted a seat in the House from Wisconsin to California.[26] DX 39 at 24-25 and Table 2.1. Neither the Secretary in his decision nor the United States before this Court, denies that Wisconsin enjoys an additional seat in Congress, and California is deprived of one, solely because of deficiencies in the uncorrected enumeration.[27]

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[26] The Bureau's loss function analysis shows that the unadjusted counts malapportion two seats more in the House of Representatives than do the adjusted. Tr. 1267. The United States itself acknowledges that the revised corrected figures developed by the Bureau in 1992 show a shift of the same seat from Wisconsin to California. U.S. Br. 18. *See also* Pet. App. 220 (use of different smoothing model showed shift of seat from Wisconsin to California).

[27] The United States suggests that none of the plaintiffs have standing to assert constitutional claims based on the malapportionment of Representatives among the States, because California chose not to appeal from the district court's decision. U.S. Br. 19 n.16. But Arizona, another State that gains a Representative if the adjusted figures are used, is a

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE SECRETARY'S DECISION WAS SUBJECT TO STRICT SCRUTINY, THAT PLAINTIFFS HAD SHOWN THAT THE DECISION DID NOT REFLECT A GOOD FAITH EFFORT TO MAXIMIZE CENSUS ACCURACY AND THAT THE CASE SHOULD BE REMANDED TO PERMIT THE UNITED STATES AN OPPORTUNITY TO SHOW A COMPELLING NECESSITY TO USE LESS ACCURATE DATA FOR THE ATTAINMENT OF SOME LEGITIMATE OBJECTIVE

1. The United States argues that the court of appeals erred in applying cases such as *Karcher* to "the Executive Branch's

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respondent. Moreover, individual voters who are residents of California have standing based on the malapportionment of the House, in which Representatives "'represent the people as individuals'", *Montana*, 503 U.S. at 459-460 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 14 (1964)). The United States questions whether the State is not the proper party to assert a challenge to the apportionments. U.S. Br. 19 n.16. The suggestion is that a State could limit equal representation rights for its residents by giving up a Representative to which its residents were entitled and leaving them with larger congressional districts (and more diluted votes) than their constitutional entitlement would provide. The authority just cited rebuts that suggestion. The United States' further suggestion that it makes a difference that the State commenced but then discontinued its participation would have the odd consequence of putting residents in a *worse* position if their State joined their suit than if the State never participated at all. Finally, once it is established that one party has standing to challenge the apportionment, further analysis is unnecessary, since any adjustment must be nationwide. *See id.* at 35. The United States also concedes, *id.* at 30 n.23, that other plaintiffs have standing to challenge the Secretary's decision due to injuries based upon the distribution of federal funds. That not all of the plaintiffs before this Court can assert every claim before the Court is of no practical significance, since the decennial census must comprise just one set of figures whether used for apportionment, redistricting or allocation of funds.

conduct of the census and certification of state population figures" because of constitutional constraints on the apportionment that prevent equalization of congressional district sizes among states. U.S. Br. 40 & n.30.[28] The court of appeals, however, explicitly recognized that, because of those constitutional constraints—that each State be allotted at least one Representative, that no district be smaller than 30,000 people, and that congressional districts not cross State boundaries—precise equality of voting power cannot be achieved for the nation as a whole. Pet. App. 35. But, the court, relying on *Montana*, wrote, "[t]hat the goal of precise equality cannot be achieved nationwide on account of those constraints . . . does not relieve the federal government of the obligation to make a good-faith effort to achieve voting power equality 'as nearly as is practicable.'" *Ibid.* (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964)).

The court of appeals' reliance on *Montana* was correct. There, having determined that the case was justiciable, the Court proceeded to analyze Montana's claim in light of *Wesberry*. The Court's rejection of Montana's challenge was based not on the conclusion that the goal of equal representation is irrelevant to the apportionment of the House but on the determination that the facts in *Montana* did not

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[28] The United States also suggests that *Karcher* does not apply because of the "technical complexity of the enumeration process", U.S. Br. 40 n.30; but that "technical complexity" refers to the work of the Bureau, not the decision of the Secretary, *supra*, p. 61. The United States also argues that the constitutional grant of authority to Congress to dictate the manner of the census "suggests that a broader range of legitimate governmental objectives may be available to justify use of census figures that do not maximize population equality than would be true of decisions made in the state districting context." *Ibid.* As the United States recognizes, *ibid.*, *Karcher* already qualifies the obligation to maximize equal representation in terms of practicability, 462 U.S. at 730, so the United States' objection cannot be that the *Karcher* standard fails to take practicability into consideration.

"establish a violation of the *Wesberry* standard." *Montana*, 503 U.S. at 461. In particular, the Court observed that the constitutional constraints on apportionment "make[] it virtually impossible to have the same size district in any pair of States, let alone all 50." *Id.* at 463.[29] Yet the Court embarked on a detailed analysis of the arguments, based on

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[29] Montana challenged the use in apportioning the House of the method of equal proportions (Hill method), arguing that equal representation was better served by the method of the harmonic mean (Dean method); had the Dean method been used, a seat in the House would have shifted from Washington to Montana. *Montana*, 503 U.S. at 460-461. With reapportionment after the 1990 census, the average congressional district size nationally ("ideal district size") was 572,466 persons. The actual apportionment, using the Hill method, gave Montana a single district, with a population of 803,655, and gave Washington an average district of 543,105. The absolute deviation from ideal district size for Montana was thus 231,189 and for Washington 29,361. Use of the Dean method would have minimized absolute deviations from ideal district size; that is, the sum of the differences between the average and the ideal district size in the two States would have been reduced. *Id.* at 461. But *relative deviations* from ideal district size (the ratio of the absolute difference from the ideal to the average district size within the state) would have been increased for both states; the Hill method minimized *those* deviations. *Id.* at 462 & n.40. It was with respect to the choice between a method that would minimize absolute deviations and a method that would minimize relative deviations that the *Montana* court wrote: "The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course." *Id.* at 463. The United States now suggests that that sentence was meant generally to counsel judicial abstinence when faced with claims concerning Section 2, Clause 3 of Article I of the Constitution. U.S. Br. 26-27; *see also* Wisc. Br. 21. But if the Court had had such a broad proposition in mind, it would never have embarked on the detailed discussion of the competing arguments, based on equal representation, in favor of either method; rather, the Court would have ended the discussion at the point of establishing that, with the apportionment of the House at issue, the goal of "'precise mathematical equality'" in representation is "illusory for the Nation as a whole." *Id.* at 463 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969)).

equal representation, favoring the method of apportionment used and that Montana proposed. *Id.* at 459-463. The Court also satisfied itself that Congress' choice of a method had been made in an apparently good-faith attempt to implement the Constitution's purpose. *Id.* at 464. The Court reaffirmed that approach in *Franklin*, when, citing *Montana*, it reviewed the Secretary's decision concerning allocation to the states of overseas personnel to determine whether it was "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S.Ct. at 2777.

On the basis of this Court's decision in *Montana*, the court of appeals "conclude[d] that the federal government, no less than the states, is required to make a good-faith effort to achieve the Constitution's plain objective of equal representation for equal numbers of people." Pet. App. 35. The Secretary's failure to select as the decennial census the counts that would in fact promote that goal would therefore subject his decision to strict scrutiny, both because the decision impaired a fundamental right and because it impaired that right more severely for members of minority groups, a "suspect" class.

2. The United States next argues that, assuming application of *Karcher*, the court of appeals nonetheless erred in determining that an absence of good faith had been shown.

As evidence of good faith, the United States points first to "the success of the Bureau in counting 98.4% of the nation's population," U.S. Br. 41. The United States misapprehends the thrust of respondents' claim and of the court of appeals' decision. Respondents have never challenged the acumen nor the *bona fides* of the Bureau: there is no doubt that the *Bureau* made a good-faith effort to achieve the most accurate count practicable, and no small part of that effort was reflected in the recommendation of the Bureau's Director that the census counts be adjusted. Respondents' challenge, however, is to the *Secretary's* decision. The

question of whether the Secretary rendered his decision in favor of one set of data in good faith is not answered by examination of the circumstances under which the two sets of data came into existence. There is no inconsistency in asserting that each of two sets of data was created (by the same agency, after all) in a good-faith effort to achieve population equality but that the decision between them was not made in pursuit of the same good-faith effort.

Second, the United States argues that, since "[t]he Constitution allows for varying approaches to the conduct of the census and varying measures of accuracy and equity", U.S. Br. 43, the Secretary's choice of one measure of accuracy does not demonstrate an absence of good faith merely because another measure might have been chosen. Respondents do not advocate a particular approach to the conduct of the census, nor do they deny that there is considerable choice afforded the Secretary among measures of accuracy and equity. But the Secretary's choice of a measure of accuracy that is concededly "not a good way" of measuring accuracy and in the face of evidence that application of the measure actually disserves the goal of equal representation is not an "apparently good-faith choice of a method", U.S. Br. 43 (quoting *Montana*, 503 U.S. at 464) for determining the set of data to be reported as the decennial census.[30]

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[30] The United States also argues that the court of appeals' decision opens the door to a host of challenges to decisions made in planning and conducting the census. U.S. Br. 41 & n.31. As the list of cases cited by the United States, *id.* 41 n.31, shows, when such cases have been brought in the past, the United States has invariably prevailed. Regardless of the court of appeals' decision in this case, it is unlikely that litigants challenging census-taking decisions in the future will enjoy any greater success. With or without the court of appeals' decision, a litigant must show that a proposed change in the planning and conduct of the census will in fact increase accuracy across the nation. (As the United States correctly points out, U.S. Br. 35, even a regional change in census

The United States complains, U.S. Br. 44-45, that the court of appeals expressed, but failed to justify, a preference for numeric accuracy over distributive accuracy. The court of appeals expressed no such preference. Rather, the court of appeals correctly described the Secretary's decision as (1) rejecting use of adjusted data that would indisputably ameliorate the differential undercount, and (2) basing that rejection on the Secretary's assertion that, under the approach to "distributive accuracy" he adopted, he was not convinced the adjusted counts would achieve superior distributive accuracy. Differential undercounting has *distributive* consequences, adversely affecting allocation of representation and funding for places with disproportionately minority populations; that is why the Bureau worried about the problem of differential undercounting and devoted so much energy to solving it. It is surely fair to say, as the court of appeals did, that, when the Bureau presented the Secretary with counts that ameliorated the differential undercount, he "decline[d] to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities" if there were any distributive consequence with respect to which an adjusted census "would be different from . . . , although just as accurate" as the unadjusted. Pet. App. 38. The Secretary, acknowledging that the adjusted data had ameliorated the differential undercount but refusing to

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procedures cannot be analyzed without taking into consideration its impact nationally.) Because census-taking involves the complex balancing of error, a mere demonstration that a particular technique will enhance accuracy with respect to one aspect of the count is not a demonstration that overall accuracy will be improved. Only a systematic demonstration of a technique to improve overall accuracy would underpin a successful claim under the court of appeals' analysis. And only the Bureau itself is ever likely to be in a position to make such a demonstration. The unique circumstances present here are most unlikely to recur: the United States' invitation to protect it from the inconvenience of lawsuits at the expense of diminished equality in representation should be declined.

recognize the distributive impact of that undercount, subsumed all evidence of improved accuracy for "racial and ethnic populations" under the concept of numeric accuracy, *see* Pet. App. 146-147, 158, 160, 165, 182-185, 200-201, and dismissed that evidence as "not relevant to the determination of distributive accuracy." Pet. App. 201.

With respect to the United States' final argument on good faith, U.S. Br. 44, the district court's findings are not "enigmatic," *supra*, pages 46-47. The district court found that the adjusted counts had been shown to be more accurate for most purposes for which the census is used but declined to characterize the Secretary's contrary conclusion as "arbitrary or capricious." That court examined the Secretary's decision only to determine whether it could be supported under the broad discretion afforded by the Secretary's own guidelines. From the premises that the Secretary selected the less accurate data as the census but that his guidelines permitted him to do so it hardly follows that the Secretary's decision was necessarily the product of a good-faith effort to maximize census accuracy.

The United States scarcely reckons with the additional bases for the court of appeals' determination that the Secretary's decision did not reflect "the required good-faith effort", Pet. App. 39. The court of appeals observed that the Secretary had sought to justify his decision against adjustment in part with the ostensible concern that using an adjustment admittedly not the result of political manipulation might nonetheless open the door to such manipulation in future censuses and in part with the opinion (not shared by the Bureau) that the use of statistical processes would discourage State cooperation with future census efforts. Pet. App. 38. The United States admits the Secretary's reliance on those factors, then describes them as "not central to this case for present purposes" and finally explains that the Secretary's concerns were "not irrelevant to the overall, long-term accuracy of the

census." U.S. Br. 29 n.21. The speculative character of the Secretary's ostensible concerns and their attenuated relationship ("not irrelevant") to any interest in census accuracy, taken together with the Secretary's readiness to invoke any available argument against adjustment, help establish that the decision against adjustment was not made in the interest of maximizing census accuracy but on the basis of an unshakable predisposition. As the court of appeals observed, the Secretary was aware of but indifferent to the long, well-documented history of differential undercount and Bureau attempts to reduce it. Pet. App. 39. The Secretary's effectively irrebuttable presumption against adjustment, his appointments to the Special Advisory Panel, his rejection of Bureau expertise, his retention of outside experts for the specific purpose of designing a defense of his decision, all testify, as does the decision itself, to the absence of a good-faith effort to achieve the most accurate census counts practicable.

3. The United States asserts that "[t]he court of appeals was simply wrong" in determining that the Secretary's decision was subject to heightened scrutiny without proof of discriminatory purpose. U.S. Br. 45. The United States, relying on *Washington v. Davis*, 426 U.S. 229, 239-245 (1976), asserts that "establishment of an equal protection violation based upon racial discrimination requires proof of a discriminatory *purpose*." U.S. Br. 45 (emphasis in original). But the court of appeals, in an analysis not discussed by the United States, explained that, "[a]lthough for most types of equal protection claims, a plaintiff must show the government's discrimination was intentional, the Supreme Court has not imposed such a requirement in any of the cases involving apportionment." Pet. App. 35-36 (citations omitted). The court of appeals quoted the opinion in *Tucker v. United States Department of Commerce*, 958 F.2d 1411, 1414 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 407 (1992), which points out that malapportionment cases do not require proof

of intent, though other equal protection cases do. "The purpose of *that* requirement [of proof of intent] is to prevent the concept of equal protection from being used to invalidate governmental policies that just happen to bear more heavily against a vulnerable group, whereas the reapportionment cases vindicate a right that the Supreme Court has found to be implicit in the Constitution to an apportionment mechanism that will, so far as possible give each person's vote the same weight in an election." Pet. App. 36. The effect of the Secretary's decision is that, in general, the votes of minority citizens are given less weight than those of non-minority citizens. What determines the burden of proof is the fact that this is a case concerning electoral representation, not the fact that the disparate effect occurs along racial lines.

The court of appeals explained, "In general, if a law alleged to infringe a certain right directly would require a heightened degree of scrutiny, heightened scrutiny should also be given when the law is alleged to infringe that right discriminatorily." Pet. App. 33 (citations omitted). The Secretary's choice of a count generally less accurate would thus trigger strict scrutiny because of the adverse impact on equal representation rights. Even were it assumed that the Secretary was genuinely in doubt about the comparative accuracy of the two counts or found the two counts equally erroneous, his choice of the count in which inaccuracy is systematically concentrated among minorities instead of the count in which inaccuracy is non-systematically distributed throughout the population would warrant strict scrutiny. *Cf. Karcher*, 462 U.S. at 752-755 (Stevens, J., concurring) (districting plan that achieves equipopulousness may nonetheless violate right of equal representation through adverse impact on minorities together with departures from neutral criteria). The degree of scrutiny, and the burden of proof, flows from the nature of the right (equal representation), not the basis on which the infringement occurs. The United States' argument that there is no proof of

discriminatory animus, U.S. Br. 45-50, is therefore beside the point.

The United States also argues that there is no proof that members of minority groups are differentially distributed and that the consequence of differential undercounting of minorities would therefore be to deprive areas in which minorities are concentrated of political representation and funding. U.S. Br. 48. But "[i]t is absurd to suggest that a disproportionate loss of political representation will not follow in the wake of a miscount." Pet. App. 128-129. That was the very reason the Bureau undertook its laborious, decade-long effort to ameliorate the differential undercount—precisely because of the impact of that undercount on the areas in which minorities are concentrated. *See* Jt. App. 79; Tr. 1277. In any event, plaintiffs demonstrated at trial both that undercount was, as expected, more severe in those states with greater concentrations of minority residents and that the effect of differential undercounting was to deprive residents of equal representation. *Supra*, pages 26-28.

III. ADJUSTMENT OF THE CENSUS IS NOT PROHIBITED BY 13 U.S.C. § 195

1. The States of Wisconsin and Oklahoma argue at length that any adjustment of the census is barred by 13 U.S.C. § 195, which provides:

> "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

See Wisc. Br. 31-33, Okla. Br. 7-18. As pointed out by the United States in its Opposition to State Petitioners' Motion to Extend Time for Oral Argument and for Divided Argument, that argument was not presented in either States' Petition for Writ of Certiorari and is not encompassed by any

question with respect to which the Court has granted certiorari. *See* Federal Petitioners' Opposition to State Petitioners' Motion to Extend Time for Oral Argument and for Divided Argument ("U.S. Opp."). The question, therefore, is not properly before the Court. The State petitioners should not be allowed argument on, and the respondents should not be required to address, this issue. The State petitioners' tactics amount to "the practice of smuggling additional questions into a case after [the Court] grant[ed] certiorari." *Irvine v. California*, 347 U.S. 128, 129 (1954).

Supreme Court Rule 14.1(a) clearly admonishes that "[o]nly questions set forth in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). It is not enough that a question be "related" to or "complementary" to the question presented. Stern, Gressman, et al., *Supreme Court Practice* § 6.25(f) at 338 (7th ed. 1993). In order to be considered "fairly included," the question must be "predicate to an intelligent resolution of the question on which [the Court] has granted certiorari." *Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980).

The question of whether section 195 prohibits the use of statistical sampling in determining the census figures for apportioning Representatives is separate and distinct from the question of whether the decision of the Secretary not to correct for the differential undercount of minorities was consistent with the language of the Constitution. *See* State of Wisconsin, Petition for Writ of Certiorari, at i (Question Presented); State of Oklahoma, Petition for Writ of Certiorari, at i (Questions Presented). In fact, as noted by the United States, addition of this question will only serve to multiply the issues before the Court, as the Court will "be required to determine whether such a prohibition [is] itself consistent with the Constitution." U.S. Opp. at 4.

2. In any event, the argument presented by Wisconsin and Oklahoma is incorrect and should be rejected.

As the court of appeals explained, Pet. App. 23-26, section 195 must be read in conjunction with 13 U.S.C. § 141, which provides in pertinent part:

> "The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date', in such form and content as he may determine, *including the use of sampling procedures and special surveys*. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary."

13 U.S.C. § 141(a) (emphasis added). Section 141(a), as opposed to section 195, is the basis for the Secretary's authority to conduct the decennial census. As such, Congress has specifically authorized "the use of sampling procedures and special surveys" to be used for the "census of population." *Ibid.*

Interpreting this language, the court of appeals not only concluded that Congress authorized the use of statistical imputation in determining the census figures but *encouraged* it. Pet. App. at 107-110. As Wisconsin and Oklahoma admit, the same conclusion has been reached by several courts before. *See Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), *rev'd on other grounds*, 642 F.2d 617 (6th Cir. 1981). The United States too "agree[s] with the court of appeals that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." U.S. Br. 26.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN,
Petitioner,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

STATE OF OKLAHOMA,
Petitioner,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

UNITED STATES DEPT. OF COMMERCE, *et al.*,
Petitioners,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER STATE OF OKLAHOMA'S REPLY BRIEF ON THE MERITS

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STATE OF WISCONSIN, Petitioner,
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STATE OF OKLAHOMA, Petitioner,
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UNITED STATES
DEPT. OF COMMERCE, et al., Petitioners,
v.
CITY OF NEW YORK, et al., Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER STATE OF OKLAHOMA'S REPLY BRIEF ON THE MERITS

Oklahoma's opening brief argued that the Secretary of Commerce's decision not to statistically adjust the 1990 decennial census was the only legally permissible course of

action available. Oklahoma advanced this argument under art. I, § 2, cl. 3 of the Constitution which mandates that the "actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct." Under Oklahoma's view, Congress exercised the power granted to it by the Constitution and enacted the Census Act, which directs the manner in which a census is taken. Congress allows statistical sampling for some census purposes but has specifically prohibited a statistical adjustment of the decennial census for apportionment purposes under 13 U.S.C. § 195. The same straightforward argument was similarly advanced by Wisconsin in its opening brief.[1]

Oklahoma further argued that Congress' decision not to permit statistical sampling to determine the census count for apportionment purposes commands considerable deference from the judiciary and furthers important national goals of political stability and public confidence. Oklahoma addressed the lack of justiciable standards for reviewing census methodology. Oklahoma also contended that the Second Circuit Court of Appeals' decision is inconsistent with decisions of the Sixth and Seventh Circuits which hold the apportionment clause does not create a constitutional right to census accuracy.

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[1]The federal petitioners, however, agreed with the Court of Appeals "that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." [U.S. Br. 26.] The federal petitioners made no reference to § 195 in their brief. The Executive Branch and the States have different views as to whether adjustment was a permissible choice under the law. Both Oklahoma and Wisconsin have contended throughout that the Secretary's decision not to adjust was constitutionally permissible and statutorily required.

The *City of New York, et al.* respondents ["respondents"] choose to rebut few of these contentions, except indirectly, or in a fashion that avoids the merits of the particular argument.

1. With respect to Oklahoma's central argument that the Secretary's decision was consistent with the manner that Congress had by law directed, the respondents first contend that the prohibition of 13 U.S.C. § 195 is not an issue properly before the Court (thereby aligning themselves with the argument used earlier by the federal petitioners in seeking to defeat oral argument by the States[2]). According to the respondents,

> [t]he question of whether section 195 prohibits the use of statistical sampling in determining the census figures for apportioning Representatives is separate and distinct from the question of whether the decision of the Secretary not to correct for the differential undercount of minorities was consistent with the language of the Constitution.

[Respondents' Br. 73.] Whatever distinction the respondents are seeking to draw from this observation, it has no bearing here. Instead, it is clear that the issue, as framed and argued by both Oklahoma and Wisconsin, is before the Court.

The "Questions Presented" by Oklahoma include:

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[2]The Court granted the motion to divide argument to the extent of allowing one State, Wisconsin, to divide argument with the Solicitor General.

> Whether the decision of the Secretary of Commerce is consistent with the mandate of Article I, § 2, cl. 3 of the United States Constitution that "[t]he actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct."

[Oklahoma's Petition for Writ of Certiorari, at i.]

Wisconsin presented the question of whether the Secretary's decision is "consistent with the language of the Constitution and the constitutional goal of equal representation." [Wisconsin's Petition for Writ of Certiorari, at i.][3]

As framed, the questions presented by both States fairly include the § 195 issue. [Sup.Ct.R. 14.1(a).] Certainly, at the very least, whether the plain language of § 195 prohibits statistical adjustment and whether that congressional directive is constitutional are issues "essential to analysis" of the decision below, which fall within the "fairly comprised" rule. *Procunier v. Navarette*, 434 U.S. 555, 559-60 n. 6 (1978); R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (7th ed. 1993), § 6.25(f), at 339.

Supreme Court Rule 14.1(a) serves both to provide the respondents with notice and assist the Court in selecting

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[3]Ironically, the broadest, most generic Question Presented is by the federal petitioners, who voiced the attack now used by the respondents. The federal petitioners' Question Presented reads: "Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment to the 1990 census violated the Constitution." [Federal Petitioners' Petition for Writ of Certiorari, at i.]

cases. *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992). Respondents cannot contend lack of notice. The identical argument was addressed vigorously by the States in briefing below. In their joint brief to the Court of Appeals, Oklahoma and Wisconsin argued:

> Article I, § 2, cl. 3 of the United States Constitution provides that the decennial census shall be conducted in such manner as Congress by law directs. Even if Congress could constitutionally direct the census to be statistically estimated, at this time it has not done so.

Oklahoma and Wisconsin expressly relied upon the prohibition of 13 U.S.C. § 195. [Supp. Br. of Wis. and Okla. at 1-9, see Dkt. Entry 11/8/93, Jt. App. 30.] The plaintiff-appellants below [respondents here] replied to this argument and claimed that Wisconsin and Oklahoma were "wrong" in their interpretation of 13 U.S.C. § 195. [Reply Br. of Plt.-Applts. at 24, fn. 9, see Dkt. Entry 12/6/93, Jt. App. 31.] The Court of Appeals decided against Oklahoma and Wisconsin by interpreting § 195 in a fashion which allowed and even "encouraged" the use of statistical sampling in determining census figures. [Pet. App. 25.][4]

Oklahoma's and Wisconsin's petitions for writ of certiorari, in compliance with Supreme Court Rule 14.1(f), set forth 13 U.S.C. § 195 as one of the three constitutional and statutory provisions involved. [Oklahoma's Petition for Writ of Certiorari, at 4-5; Wisconsin's Petition for Writ of

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[4]Consistent with the respondents, references given as "Pet. App." are to Wisconsin's appendix to the petition for a writ of certiorari filed in No. 94-1614.

Certiorari, at 1.][5] Respondents do not attempt to, and cannot, explain how § 195 can be designated as "involved in the case" and not be an issue which is encompassed by the petitions and properly before the Court.

Against these facts of record, the respondents and federal petitioners are simply incorrect when they assert that Oklahoma's Question Presented (under art. I, § 2, cl. 3) fails to encompass the proper interpretation of Congress' directive in 13 U.S.C. § 195. Respondents are equally wrong when they make this same assertion against Wisconsin.

2. To bolster their contention that argument should not be allowed on this issue, respondents also claim this question will only serve to multiply the issues before the Court, because (quoting the federal petitioners), the Court will "be required to determine whether such a prohibition [is] itself consistent with the Constitution." [Respondents' Br. 73.] Oklahoma contends this paramount issue simplifies rather than multiplies the issues. Unless § 195 means something different from its plain language or unless it is not consonant with the constitutional text, the inquiry should end with § 195. The inquiry should end because the manner of conducting the census is delegated to Congress and Congress responded with § 195.

The reality is that, absent the intervention of Oklahoma and Wisconsin in the lower court actions, this potentially dispositive issue would have been left unaddressed because the remaining parties before this Court share the common goal of simply ignoring 13 U.S.C. § 195. The Executive Branch has a strong interest in gaining for a

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[5]The federal petitioners included no reference to 13 U.S.C. § 195.

federal agency the broadest decision-making power possible and thus for altogether different reasons than the respondents "agrees with the court of appeals that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." [U.S. Br. 26.]

The debate between the Executive Branch federal petitioners and the respondents presumes the Secretary possesses the statutory power to adjust and focuses primarily on whether the Secretary's administrative decision not to do so is constitutionally flawed. Oklahoma contends the Secretary is statutorily prohibited from any course other than the one taken. If fundamental change is going to occur in the manner of determining the census count, then the change must occur through Congress and not through any other branch of government. Respondents and the federal petitioners cannot selectively ignore constitutional and statutory text that impacts reasoned analysis. In *any* review of an agency's action, it is proper to ask whether the agency has authority to do what it did or what it is being asked to do. It is impossible for this Court to rule that the Secretary should have adjusted the 1990 census for apportionment purposes *without* determining whether he has the power to adjust. Yet, that is precisely what respondents ask this Court to do.

3. The respondents choose not to address the portion of the Constitution which directly speaks to the business of census taking. Article I, § 2, cl. 3 states that the decennial census shall be conducted "in such Manner as [Congress] shall by Law direct." Respondents make no reference to this provision or to its application. If the Constitution directs that Congress determine census methodology and § 195 is a response to that constitutional directive, then it would appear

that § 195 should be addressed in a case that concerns census adjustment.

In their seventy-five page brief, respondents devote a single page to countering the merits of the States' interpretation of § 195. Respondents' argument is limited to a recitation of 13 U.S.C. § 141(a), and the conclusion that the Secretary can choose to rely on § 141(a), instead of § 195, as the basis for his authority. The respondents close by stating that the Court of Appeals correctly held that these two provisions indicate that Congress encourages adjustment and other courts and the federal petitioners concur. There is no further discussion of the § 195 issue.

Respondents' argument is wrong. While Oklahoma concedes that a handful of lower courts have judicially interpreted § 195 in a way that circumvents the plain language, none, save the Court of Appeals, have concluded that the two sections read together meant Congress intended to encourage use of statistical sampling for apportionment purposes. In this case, the Second Circuit reached this strained conclusion, but the other three cases did not do so. Moreover, Oklahoma submits that none of the three 1980 district court holdings relied upon by respondents can withstand careful analysis.[6] There is nothing in the Census

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[6]The cases are: *Carey v. Klutznick*, 508 F. Supp. 404 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd on other grounds*, 642 F.2d 617 (6th Cir. 1981). [See Respondents' Br. 74.] *Carey* held that adjustment was permissible under § 195, but only if done in conjunction with traditional counting methods. *City of Philadelphia* held that § 195 permits, but does not require, sampling for apportionment purposes. *Young* held that § 195

Act that allows the Secretary to choose to follow one part of the Act and ignore another part of it. The Census Act

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allows adjustment but prohibits the use of figures solely derived by statistical methods. None of the three cases holds that § 195 *encourages* adjustment for apportionment purposes.

Carey is wrong because it relies on *Young* and because it concludes that it must ignore the clear language of § 195. *Carey*, 508 F. Supp. at 415. *Carey* holds that it must adopt an interpretation that gives effect to both §§ 141(a) and 195. *Carey* does not, however, address the logical interpretation that these two statutes, when read together, direct that adjustment be used for non-apportionment census functions but not for apportionment purposes.

City of Philadelphia is decided incorrectly because it is based upon a selective reading of the legislative history of the Census Act. *City of Philadelphia* does not address the clear statements in the 1957 and 1976 House and Senate Reports that sampling procedures can be used by the Secretary except in the apportionment of the United States House of Representatives. See H. R. Rep. No. 1043, 85th Cong., 1st Sess., at 10 (1957); S. Rep. No. 698, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1706; S. Rep. No. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5468.

Young is wrong for several reasons. First, the plain language of § 195 does not state that sampling can be a part of the count, but not all of the count, for apportionment purposes. Second, the conclusion that § 195 means what it says and actually prohibits adjustment for apportionment purposes does not render it unconstitutional. Article I, § 2, cl. 3 of the Constitution directs Congress to specify the decennial census method. Finally, *Young* errs because it is based upon the conclusion that there is a constitutional right to census accuracy.

contains both §§ 141(a) and 195, and both must be followed. Respondents also fail to address the fact that § 141(a) does not state that sampling or adjustment can be used for apportionment purposes. Section 141 merely provides that sampling can be used with the census and the census can be used to collect different types of information. When §§ 141 and 195 are read together, the logical conclusion is that adjustment is allowed for non-apportionment purposes. Respondents offer nothing to refute this conclusion. Respondents make absolutely no attempt to explain why the Secretary should be allowed to adjust when § 195 expressly states that there can be no adjustment for apportionment purposes. Respondents offer nothing to refute the plain language of § 195.[7] That plain language is the constitutionally prescribed "manner" which Congress by law directed under art. I, § 2, cl. 3.

Even if Congress could constitutionally direct the decennial census to be statistically estimated, at this time it has chosen otherwise. Thus, the Secretary would have violated the mandate of art. I, § 2, cl. 3 if he had decided to allow statistical sampling for apportionment purposes. Congress has, by law, directed otherwise.

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[7]As also noted in legal commentary, the conclusion that the prohibition in § 195 is not actually a prohibition "mutilate[s] the clear wording of the statute." Note, *Lies, Damn Lies and Statistics: Dispelling Some Myths Surrounding the United States Census*, 1 Detroit L. Rev. 71, 87 (1990); Note, *Death, Taxes and Census Litigation: Do the Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy?*, 64 Geo. Wash. L. Rev. (forthcoming Jan. 1996) ("the text of section 195 and its legislative history are clear -- sampling is not allowed [for] purposes of apportioning the House of Representatives.").

The language of § 195 is clear. If statutory language is clear, then judicial inquiry into statutory meaning is finished. *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980); *Negonsott v. Samuels*, 113 S. Ct. 1119, 1123 (1993). The law also presumes that when Congress speaks in a statute, it means what it says and it says what it means. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). Respondents ignore these presumptions. They offer no explanation as to why these canons of interpretation should not be followed. They do not and cannot explain away § 195.

Nor do respondents address the legislative history of § 195. Respondents do not dispute that the 1957 House Report, prepared with the enactment of § 195, states that "section 195 does not authorize the use of sampling procedures in connection with the apportionment of Representatives."[8] They also make no reference to the 1957 Senate Report which contains similar language.[9] Respondents do not deny that when Congress amended § 195 in 1976, it did not change the language that prohibits

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[8]U.S. Cong. House Comm. on Post Office and Civil Service. Revision of Census Law. Report to Accompany H.R. 7911. H.R. Rep. No. 1043, 85th Cong. 1st Sess., at 10, Washington, U.S. Govt. Print. Off., 1957, *and cited in* Cong. Res. Serv. Rep. for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, pp. 85-86, 96th Cong., 2d Sess. (Comm. Print 1980).

[9]S. Rep. No. 698, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1706, 1708.

adjustment for apportionment purposes. The obvious conclusion must be that if Congress made the prohibition at enactment and kept the prohibition at amendment, then the prohibition remains effective. Respondents do not challenge this argument.

4. Respondents also offer no response to Oklahoma's contention that Congress properly limited the census method in § 195 because Congress has the power to enact legislation that is "necessary and proper" to carry out its delegated responsibilities. U.S. Const. art. I., § 8, cl. 18. Congress has the power to determine the means of achieving its constitutionally authorized objectives. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966); *Kinsella v. United States*, 361 U.S. 234, 247 (1960). Congress decided that, as to the census objective, adjustment should not be used for apportionment purposes. This decision commands great deference from the judiciary, especially in light of the Constitution's explicit directive to Congress to determine the census-taking method. *United States Dept. of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992). Instead of granting deference to Congress' decision, respondents seek to completely ignore it by rejecting any application of § 195.

5. One primary reason advanced for granting the certiorari petitions was the conflict between circuit court rulings on the question of census adjustment. The Second Circuit's holding in this case is directly opposite to the decisions of the Sixth and Seventh Circuit Courts of Appeals in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), and *Tucker v. United States Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992). Both *City of Detroit* and *Tucker* rejected claims that the 1990 census should be statistically adjusted and both ruled that there is no

constitutional right to census accuracy. *City of Detroit*, 4 F.3d at 1375, 1378; *Tucker*, 958 F.2d at 1417, 1419. Respondents, however, make no attempt to refute these rulings. Respondents' treatment of these two cases is limited to one reference to *Tucker*. The lone reference to *Tucker* does not include the holding of the case but concerns only the issue of the requirement of intent in equal protection cases. [Respondents' Br. 70-71.] Respondents do not mention the *City of Detroit* opinion.

6. Respondents' brief demonstrates almost conclusively an observance made in both *City of Detroit* and *Tucker*. That is, adjudicating claims of this type would require the Court "to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to a census headcount." *City of Detroit*, 4 F.3d at 1378, quoting *Tucker*, 958 F.2d at 1418.

Respondents make no attempt to provide justiciable standards with which to decide this dispute and they do not address Oklahoma's contention that there are no available standards to apply. Neither the "one man, one vote" principle nor the constitutional language "in such Manner as [Congress] by Law shall direct" gives sufficient guidance to resolve a statisticians' debate. There is no justiciable standard by which to decide whether, in this case, the proposed formula with its 1,392 "smoothed," "modelled" and "regressed" adjustment factors is the formula required by the law.[10]

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[10]Respondents wholly misstate Oklahoma's position in this case by asserting that the "heart" of the petitioners' (and thus Oklahoma's) argument is based upon the claim that the "uncorrected census counts are, or at least probably are, as

Respondents admit that this dispute is framed by subjective, rather than legal, standards. Their analysis of the facts contains numerous references to the subjective nature of the issues involved: (1) the strata used in the Post-Enumeration Survey ("PES") provided "the greatest explanatory power in analyzing differences in undercount rates," (2) the Census Bureau director concluded that "prospects for a successful adjustment were good," (3) matching error in the PES "was not a serious source of bias," (4) the "impact of the aggregate error attributable to misreporting on the overall PES was insignificant," (5) "fabrications were found to be minimal," (6) error from follow-up interviews was of "minimal consequence," and (7) the Census Bureau concluded that "post-stratification had been effective." [Respondents' Br. 18, 22, 30, 31.] There are no legal standards to determine whether these conclusions satisfy the law. Nothing in the law directs a court to conclude whether something is a "serious," "insignificant" or "minimal" problem in a census adjustment formula. Respondents offer no legal standards to resolve this case.

7. While respondents pay lip service to the need to protect against politicization of the census process and imply politicization has occurred by the Secretary overriding technical expertise within the Census Bureau [Respondents'

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accurate as or more accurate than the corrected counts." [Respondents' Br. 2.] Oklahoma's position does not focus upon whether one method of number-finessing is better than another method. Instead, Oklahoma contends "responsibility for conducting the decennial census rests with Congress." *Baldridge v. Shapiro*, 455 U.S. 345, 347-48 (1982). Because broad discretion has been vested in Congress to direct the census process, the judiciary has only limited review.

Br. 58-59], respondents appear oblivious to the real dangers of political manipulation inherent in the course of action they advocate. If the Executive Branch has the power to make post-enumeration adjustments to the actual headcount, then any methodology for adjustments will be subject to partisan argument and "open the census process to charges of political manipulation." *Tucker*, 958 F.2d at 1413. Respondents pose no justification for disregarding concerns that opening the census up to adjustment by a variety of formulas will politicize the process and disrupt the transfer of political power in state governments. Respondents do not deny that public confidence in government and political stability are jeopardized in a world where the census figures are not or cannot be fixed because different interests advocate and litigate different adjustment formulas. The ability of federal courts to resolve complex statistical disputes about the best way to conduct a census is limited, at best. It is virtually guaranteed that not all courts would take the same side in a dispute of considerable technical complexity among census officials, statisticians and demographers. Protracted litigation disrupts and threatens the governmental timetable for a representative system of government. Here, return of the case to the district court would undoubtedly mean the census would be unresolved through the 1996 Presidential and congressional elections.

8. The majority of respondents' brief is devoted to the proposition that statistical adjustment results in a more accurate census and that the Secretary's refusal to adjust denies citizens equal voting power. [Respondents' Br. 48, 50.] As discussed above, this position is flawed because it does not address whether the Secretary has the *power* to adjust the census for apportionment purposes. If, however, one assumes for the sake of argument that the Secretary does have the ability to adjust, then respondents'

position still fails. Respondents' argument breaks down because it is premised upon a right to voter equality but it makes no connection between voters and the census. Respondents do not address the fact that the census does not count voters. It counts people, voters and nonvoters alike. This fact was addressed by the Seventh Circuit Court of Appeals in *Tucker*. After referencing this Court's adoption of the "one man, one vote" principle, the Seventh Circuit stated:

> Correcting the undercount might actually offend against that principle, by creating disparities in voting power based not on differences in the number of voters but on differences in the number of nonvoters.

Tucker, 958 F.2d at 1419.

The Seventh Circuit did not ultimately resolve this issue because it based its decision on other grounds:

> On the other hand, it can be argued that people, not just voters, are entitled to equal representation, [citations omitted] consistent with the Constitution's reference to apportioning congressional representation by "Numbers" (of people). [citations omitted] But all this is an aside. The dispositive consideration in this case is that, though even fine points of statistical methodology can have real consequences, a case about statistical

> methodology is a case whose gears fail to mesh with any judicially enforceable federal rights.

Tucker, 958 F.2d at 1419. Although the Seventh Circuit did not answer this question, the court in *Tucker* did recognize that this question is relevant in the context of census adjustment disputes.

In this case, there is nothing in the record that establishes whether the undercounted people are voters or nonvoters. If for example, a corrected count added a large number of people to State "A" and increased "A's" number of representatives but the added people were nonvoters, then arguably, the voters of State "B," that lost a representative, suffered a loss of voting strength. The voting power of the voters in State "B" would be diluted because fewer numbers of voters would be electing more representatives in State "A" than in State "B." Such a result contradicts the "one man, one vote" principle.

If respondents base their argument on the right to voter equality, then they should be required to connect voters to the census or explain why such a connection is not necessary. They make no attempt to do either.

For the reasons stated above and in Oklahoma's Brief on the Merits, the Second Circuit Court of Appeals' decision should be reversed and the Secretary's decision not to adjust the 1990 census should be upheld.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

[Caption Continued on Inside Cover]

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER STATE OF WISCONSIN

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STATE OF OKLAHOMA, *Petitioner,*

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SUMMARY OF ARGUMENT

Respondents leave unanswered the difference between review of census procedures claimed to be constitutionally proscribed and the affirmative recognition of constitutionally mandated census innovations claimed necessary to achieving the most accurate census practicable. Respondents' brief is notably silent regarding Congress' express constitutional authority to determine how best to take the census. The respondent states also fail to discuss their ability to "correct" the inequalities alleged to exist in their own congressional and legislative districts through the use of the adjusted block-level census data ordered released by the district court more than two and a half years ago.

Respondents expand the court of appeals' error by attempting to engraft a redistricting standard of "good faith" onto census decisions, without discussion or analysis of this standard in Art. I, § 2 cases. This allows respondents to transform a standard of review of census decisions for consistency with constitutional language and the constitutional goal of equal representation, *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2777 (1992), into an open-ended inquiry into subjective purpose. Much of respondents' factual argument is answered by the district court's findings that the Secretary's decision was neither arbitrary nor capricious. Equally important is respondents' misapplication of Art. I, § 2 precedent. A redistricting plaintiff bears the threshold burden of demonstrating the ability to achieve smaller population deviations than those resulting from the challenged plan. *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983). Neither the district court nor the court of appeals found, and respondents could not demonstrate, that the statistical estimates enabled the Secretary to improve, and not simply change, the apportionment of Congress.

ARGUMENT

I. RESPONDENTS HAVE FAILED TO PRESENT ANY PRINCIPLED BASIS FOR RECOGNIZING CLAIMS THAT SPECIFIC CENSUS INNOVATIONS ARE CONSTITUTIONALLY MANDATED.

Wisconsin argued in its opening brief that where the procedures selected for taking the census are not claimed to be constitutionally proscribed, and at least where they do not represent a retreat from prior efforts to achieve census accuracy, the failure to adopt additional census innovations--in particular, previously untried procedures, having the potential for introducing significant errors into the counts and implicating serious issues of policy and legality--should be held not to violate the Constitution. Specifically, the decision whether to employ statistical estimation procedures to "correct" the results of the enumeration census is not mandated by the Constitution, but represents a legislative judgment to be made by Congress or, to the extent Congress has delegated its authority over census decisions, the Executive Branch.[1]

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[1]Whatever the similarities between methods of imputing residents of known housing units and statistical estimation of the entire population and its distribution, *see* Respondent's Brief at 4-5, a method of multiplying statistically derived fractional adjustment factors times every person actually counted in the census has never been used to apportion Congress. It may be noted that the district court case cited by respondents regarding imputation, *Orr v. Baldridge*, No. IP 81-604-C, Order and Memorandum Entry (S.D. Ind. filed July 1, 1985), found that "hot deck" imputation was not sampling, and therefore not barred by 13 U.S.C. § 195, prohibiting the use of sampling as part of the apportionment census.

In this brief, references to the Brief of Petitioner State of Wisconsin are given as "Wisc. Br.;" references to the Brief for the Federal Petitioners are given as "U.S. Br.;" references to the Brief of Respondents are given as "Resp. Br.;" references to the *Amicus Curiae* Brief of the Lawyers' Committee for Civil Rights Under Law, the

It is not that efforts should not be made to reduce or eliminate the unintended errors that are inherent in census-taking. Rather, constitutional text and history, this Court's precedent, logic and common sense reveal that a judicially enforceable right to procedures claimed necessary to achieving the "most accurate census practicable" (J.A. 48) lacks meaningful constitutional content, conflicts with Congress' express constitutional authority to direct the manner of taking the census and results in an untenable system of census governance. The recognition of claims to mandated census innovations has spawned two decades of protracted litigation, which, for having failed to improve equality, has succeeded in transforming a process intended to confer finality in the decennial reallocation of rights of political representation into one of recurring and prolonged uncertainty, and potentially, of upheaval. Respondents' brief cannot be regarded as offering any principled discussion of these issues.

1. Respondents leave wholly unanswered how the recognition of a judicially enforceable entitlement to specific census innovations can be reconciled with Congress' express constitutional authority to direct the manner of taking the census.[2] U.S. Const., art. I, § 2,

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American Civil Liberties Union, the American Jewish Committee, the NAACP Legal Defense and Educational Fund, Inc., the New York Civil Liberties Union and the Puerto Rican Legal Defense and Education Fund, Inc. in Support of Respondents are given as "Lawyers' Comm. Br.;" references to the Joint Appendix are given as "J.A.;" references to "Pet App." are to the Appendix to Petition for Writ of Certiorari in No. 94-1614.

[2] *Amici* supporting respondents suggest an institutional basis for rejecting the Constitution's allocation of census decisions to Congress, arguing that the "majoritarian branches" are inherently indifferent to an accurate count of minority populations. Lawyers' Comm. Br. at 6. The reality is that the "majoritarian branches" represent states, both in the election of Congress and the election of the President. The seven states that were plaintiffs in this action elect 158, or more than 36%, of the 435 voting Representatives to the House of Representatives and,

cl. 3. Nor do they dispute the inherently legislative nature of decisions regarding the best way of conducting the census.

2. Respondents leave largely unanswered the difference in review, under a standard of consistency with constitutional language and the constitutional goal of equal representation, *Franklin v. Massachusetts*, 112 S. Ct. at 2777, between decisions to adopt census procedures claimed to be constitutionally proscribed and decisions *not* to include specific methodological innovations claimed capable of improving census accuracy. Respondents suggest that under the court of appeals' decision, only census procedures for which "a systematic demonstration of a technique to improve overall accuracy" can be made will be constitutionally mandated. Resp. Br. at 67 n.30. Respondents go on to suggest that "only the [Census] Bureau itself is ever likely to be in a position to make such a demonstration," *id.*--a suggestion that is singularly unconvincing coming from those of the respondents to have pursued seven years of additional litigation to compel statistical estimation of the 1980 census after the Census Bureau concluded that adjustment was not feasible. *See Cuomo v. Baldridge*, 674 F. Supp. 1089 (S.D.N.Y. 1987). The better analysis of the limits of claims to the adoption of additional census innovations is to assume that a census plaintiff *would* be capable of demonstrating a specific procedure's ability to improve the "overall accuracy" of the count. In many cases, all that would seem required would be an expansion of procedures already employed by the

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with respondent District of Columbia, 175, or nearly a third, of the 538 Electors to the Electoral College. Because states have an interest in having their minority populations counted in the census, there is no reason to assume the majoritarian process incapable of, or indifferent to, identifying and correcting census errors. Indeed, this case demonstrates the interest of some states to have residents counted in the census, whether or not they exist. The concerted efforts undertaken during the 1990 census to count minorities further belie this supposed institutional indifference.

Census Bureau. If a plaintiff *could* demonstrate that establishing toll-free telephone numbers to answer census questions in 30 non-English languages would produce more accurate totals than establishing lines in eight languages (*cf.* Pet. App. 15), or that an October 1 census would be more accurate than one taken April 1, in the constitutionally relevant sense of providing the population totals and distributions used to allocate representational rights over the next ten years (which it almost certainly would), or that expanding the Bureau's census awareness campaigns or targeted outreach programs or hiring additional enumerators fluent in Korean or Arabic would improve the overall count, then under a theory of constitutionally mandated census innovations, it would violate the Constitution not to do any of these.[3]

There are two related points, neither of which respondents answer. First, many census procedures seem to be wholly consistent with constitutional language and the goal of equal representation, even though additional procedures may be known to be capable of producing better counts. An April 1 census date seems entirely constitutional, as would a decision in 1960 to continue door-to-door rather than mailed enumeration. *See* Resp. Br. at 3-4. Second, the recognition of entitlements to procedures claimed necessary to taking the most accurate census practicable does not invoke an administrable

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[3]Respondents' suggestion of multi-district litigation or similar procedures to resolve multiple claims to specific census innovations, Resp. Br. at 60, underscores the inherently legislative character of deciding the best methods for taking the census and the lack of administrable standards of constitutionality for a court attempting to make that decision. A court adjudicating multiple claims to methods for improving the census would be called on to decide, not simply which innovations have the potential for improving census accuracy, but the best mix and level of innovations--the optimal number of canvassers to be hired who are fluent in non-English languages, the appropriate simplification of census forms, the correct size and stratification of any post-census samples used to derive statistically estimated corrections, the scope of targeted outreach.

standard of constitutionality. Whatever procedures are adopted, additional procedures could always be added that would make the census still more accurate.

3. The absence of meaningful standards of constitutionality is still more problematic where the innovation advanced promises uncertain improvements in census accuracy and holds the potential for introducing its own distortions in the counts. Unless racial and ethnic coverage rates are known to be uniformly distributed across all states--non-Hispanic whites living in Massachusetts having the same chance of being counted in the census as non-Hispanic whites living in Texas--confirming the existence of the differential undercount is not enough to know whether its errors will result in actual representational inequality, either at the state or national level. It is certainly insufficient to allow a court to determine that a specific post-census sampling procedure will be capable of correcting these errors without introducing new errors. The texture of the PES estimates was much more complex than is captured in the term, "differential undercount." If the PES is to be believed, Massachusetts' undercount was roughly one-seventh the size of Montana's, Idaho's or Wyoming's; Pennsylvania's, less than one-fourth; New Jersey's, Illinois's and Michigan's, one-half (Administrative Record ("A.R.") App. 10 (June 13, 1991, Release), Table 1). Every state in the Northeast and Midwest had undercounts below the national average (*id.*). Blacks living in Milwaukee had lower undercounts than non-Hispanic whites living in Los Angeles. H. Hogan, *The 1990 Post-Enumeration Survey: Operations and Results*, American Statistical Association, 1991 Proceedings of the Social Statistics Section, 1, 10. Milwaukee, home to roughly three-fifths of Wisconsin's African-American residents, had an undercount half that of Madison (A.R. App. 10 (June 13, 1991, Release),

Table 2).[4] None of these results is implied by the existence of a differential undercount.

4. Respondents elect not to comment on the upheaval in state redistricting threatened by a system of census governance in which competing statistical definitions and measurements of census accuracy remain the province and focus of litigation years after the census has been completed and reported.

5. Respondents neither mention nor offer any principled basis for resolving the conflict between the Sixth and Seventh Circuits' decisions in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992), and the Second Circuit's decision. Respondents identify intrastate districting inequality as an unconstitutional consequence of adherence to the enumeration census, Resp. Br. at 27-28, but do not discuss their ability to use non-census data to redistrict if the numbers represent "'the best population data available.'" *City of Detroit*, 4 F.3d at 1373 (quoting *Karcher v. Daggett*, 462 U.S. at 738). Significantly, the respondent states fail to explain why they have tolerated the inequality that they allege exists in their own congressional and legislative

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[4]The ability of the PES to worsen equality of representation in intrastate districting is seen in the mis-estimation of the populations of Madison and Milwaukee, Wisconsin. The June 1991 PES estimate of Madison's undercount was 2.565%. Milwaukee's was 1.234%. Revised estimates published a year later reversed the two cities' undercounts, showing Madison with an estimated undercount of 1.156%, compared to 2.298% for Milwaukee. U.S. Department of Commerce, Bureau of the Census, *Report of the Committee on Adjustment of Postcensal Estimates: Assessment of Accuracy of Adjusted Versus Unadjusted 1990 Census Base for Use in Intercensal Estimates* (Aug. 7, 1992) ("CAPE Report"), Attachment 11, page 3. Had the PES totals been used in state redistricting, Milwaukee residents would have been placed in too large districts, and Madison residents in too small.

districts, where, for more than two and a half years, adjusted block-level data have been available for drawing new districts (Pet. App. 94).[5]

II. THE SECRETARY'S DECISION WAS CONSTITUTIONAL.

1. Census procedures may be employed which generate alternative census totals, although in this case, two sets of census numbers would not have been produced, but for the district court's recognition of a judicially enforceable right to census innovations claimed necessary to achieving the most accurate census practicable (Pet. App. 67, 108-09, 123, 133-34). The availability of competing census totals opens the possibility that the

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[5]Wisconsin regards respondents' silence in the face of the statement in its opening brief that it is not aware of any of the respondent states' having used the adjusted population data to redraw their congressional or legislative districts, Wisc. Br. at 44 n.36, as a concession that they have not. If respondents' actions, rather than their words, are considered, Art. I, § 2 is interpreted as permitting states to retain districts drawn using the best census data available at the time of redistricting--in the case of 1991 and 1992 redistricting, the 1990 census--even though better data subsequently become available. This may, in fact, represent the correct interpretation of Art. I, § 2's requirements. *Cf. Karcher v. Daggett*, 462 U.S. at 738 ("because the census count represents 'the best population data available' . . . it is the only basis for good-faith attempts to achieve population equality"). But if this is the correct interpretation, the same rule, applied to the apportionment of Congress, would mean that the existing apportionment is constitutional, since the adjusted state population totals were also not available at the time of apportionment. While state congressional redistricting is governed by a standard of precise mathematical equality, *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969); *Karcher v. Daggett*, 462 U.S. at 734, this standard is illusory for the nation as a whole. *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 463 (1992). There is no logic in seeking to compel a reapportionment of Congress, six or more years into the decade, on the ground that new census numbers are claimed now to represent the "best population data available" for apportionment, if, under Art. I, § 2's much higher standard, states may constitutionally retain districts drawn before the new data were available.

selection of one set may be claimed inconsistent with the Constitution, not because the procedures producing the numbers violated any constitutional standard in and of themselves,[6] but because the alternative numbers are alleged to produce a better apportionment of Congress. This possibility was suggested in *Franklin v. Massachusetts*, where the Court referred to the appellees' failure to demonstrate that the exclusion of overseas personnel from the states' population totals would make representation in Congress more equal, citing the Art. I, § 2 redistricting standard that plaintiffs challenging a state redistricting plan bear the burden of proving avoidable population inequalities. 112 S. Ct. at 2778 (citing *Karcher v. Daggett*, 462 U.S. at 730-31).

The Second Circuit attempted to apply Art. I, § 2's standard requiring states to make a "'good-faith effort to draw districts of equal population'" (Pet. App. 37 (quoting *Karcher v. Daggett*, 462 U.S. at 730-31)), in assessing the constitutionality of the Secretary's decision. Much of respondents' brief is also devoted to demonstrating that the Secretary did not approach the adjustment decision in "good faith"--or what seems more strongly suggested by respondents' extensive discussion of facts not mentioned or relied on by either court below, to demonstrating that the

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[6]Respondents argue the Secretary's failure to give weight to the numeric accuracy of the adjusted counts as inconsistent with the constitutional constraint that no more than one Representative be apportioned every 30,000 people. Resp. Br. at 53 n.23. The point would be apposite if what was at issue were the results of the 1790, rather than 1990, census, or if the House of Representatives had on the order of 8,000 members. The argument represents an awkward attempt to buttress the Second Circuit's error in concluding that the Secretary's failure to "make the required effort to achieve numerical accuracy as nearly as practicable" compelled review under a heightened standard of scrutiny (Pet. App. 39).

Respondents choose not to address the conflicts between constitutional text and principles and specific aspects of the PES argued in Wisconsin's opening brief. *See* Wisc. Br. at 40-43.

case should be remanded for further proceedings to determine whether good faith was in fact exercised.[7]

Part of the answer to respondents' argument that an absence of good faith is demonstrated by the Secretary's purported usurpation of the Census Bureau's census authority is that constitutionally, the authority to decide how to conduct the census lies with Congress, which has in turn broadly delegated the authority over decisions regarding the form and content of the census to the Secretary of Commerce, subject to congressional oversight. 13 U.S.C. § 141(a), (f). Congress has also vested the President with the final authority to report the states' populations and the new apportionment of Congress, 2 U.S.C. § 2a, directing the Secretary to report the results of the apportionment census to the President by December 31 of the census year. 13 U.S.C. § 141(b). That a decision whether to go forward with the first-ever nationwide estimation of the apportionment census would not be left to a professional bureaucracy, where the results of the estimation process could not be completed until after Congress had been reapportioned, Certificates of Entitlement sent to the states, and state redistricting begun, seems hardly unusual, let alone, unconstitutional. Another answer to respondents' argument is that they stipulated to the Secretary's redeciding whether to adjust the census, just as they stipulated to the appointment and method of appointment of a Special Advisory Panel, and to the Secretary's deciding whether to adjust based on a set of future guidelines articulating the technical and policy grounds on which the decision would be reached

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[7]Towards the end of their brief, respondents explicitly ask for a remand different from that ordered by the court of appeals, suggesting that the court's remand "would be appropriate to permit the Secretary to redetermine the comparative accuracy of the two counts under a constitutionally permissible definition of distributive accuracy." Resp. Br. at 57. *Amici* supporting respondents are still more direct, arguing that on remand the district court should now determine whether the Commerce Secretary acted in good faith to ensure a census that was as accurate as practicable. Lawyers' Comm. Br. at 18-20.

(J.A. 61-67). As one of forty-three states not invited to nominate any members of the Special Advisory Panel, and as a state not asked to stipulate to a post-census survey that would estimate its population based on sample observations taken primarily in other states, *see* Wisc. Br. at 6, 41-42, Wisconsin finds little sympathy for respondents' sense of injury.

With respect to respondents' argument that the Secretary evaluated the distributive accuracy of the census under irrational criteria, the district court found the Secretary's evaluation of the errors introduced through estimation to have been reasonable (Pet. App. 71-84).[8] If the Secretary's analysis had been irrational, then the district court's findings under an arbitrary and capricious standard would have been wrong. Respondents did not challenge the district court's findings that the decision was not arbitrary or capricious on appeal, even if they appear to be doing so in this Court. In addition, the Secretary plainly considered factors affecting the accuracy of the adjusted numbers bearing on census uses.[9]

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[8]For arguing that the Secretary's refusal to follow the recommendations of the Director of the Census Bureau and Census Bureau staff evinced a lack of good faith, respondents fail to mention that the Bureau's Director also stated in her recommendation that adjustment was an issue as to which reasonable men and women and the best statisticians and demographers could disagree (J.A. 73). Respondents also do not mention that both the Under Secretary for Economic Affairs and Administration and the Administrator of the Economics and Statistics Administration recommended against adjustment (Pet. App. 59).

[9]As summarized in Wisconsin's opening brief, Wisc. Br. at 8-10, these included evidence casting significant doubt on the homogeneity assumption underlying the entire estimation procedure; the sensitivity of the estimates to variations in modeling assumptions, particularly as affecting the apportionment of Congress; bias introduced through procedures used to "smooth" the raw adjustment factors; the necessity of imputing a significant number of unresolved sample/census matches, and significant measured bias in the estimates. *See also* U.S. Br. at 13-19. The Secretary also expressed concern that the estimates had

2. The greater problem in respondents' argument is that it simply treats the concept of "good faith," engrafted onto census decisions by analogy to Art. I, § 2 redistricting, as an open-ended standard of subjective purpose.

As argued in Wisconsin's opening brief, and again unanswered by respondents, "good faith" in redistricting reflects the objective feasibility of achieving smaller population deviations in a state plan, rather than the state's purpose in adopting a plan. If a redistricting plaintiff is able to put forward a plan that achieves smaller population deviations than the state's plan, the state plan fails. If the redistricting plaintiff is unable to demonstrate the ability to draw districts with smaller population deviations, his claim fails. *Karcher v. Daggett*, 462 U.S. at 731 ("if [redistricting plaintiffs] fail to show that the differences could have been avoided the apportionment scheme must be upheld"). The claim does not become better because the state relied on a particular statistician, assisted by a single graduate student, *cf.* Resp. Br. at 37 n.17, to develop its plan, or because the state legislature adopted a plan after "undelegating" the authority of a non-partisan redistricting commission.

Applying these principles to the census, if one set of census totals produced an incorrect apportionment of Congress, and another set produced the correct, or at least a "better," apportionment, the deliberate choice of the totals resulting in the worse apportionment would be inconsistent with the goal of equal representation. The decision not to use available numbers resulting in a better apportionment would be analogous to a state's failure to create equal population congressional districts, where

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been generated under severe time constraints employing cutting edge statistical techniques, creating the risk that a decision to adjust might be based on research conclusions later reversed (Pet. App. 248). The subsequent discovery of two errors in the PES accounting for nearly a fourth of the original undercount estimate (Tr. 1786-87, 1790-91; DX 31) confirmed the validity of this concern and its bearing on census uses.

smaller population deviations could have been achieved by adopting a different redistricting plan. As in Art. I, § 2 redistricting, "good faith" in the selection of census results would reflect objective feasibility. If alternative census numbers could not be determined to improve the apportionment of Congress, the decision not to use them would be at least "consonant with, though not dictated by" the goal of equal representation. *Franklin v. Massachusetts*, 112 S. Ct. at 2778. And if "better" numbers were not available at the time of apportionment, the failure to use them would not be inconsistent with constitutional language or the goal of equal representation. *See* n.5, *supra*. Where the relief sought is of no less moment than a judicially mandated reapportionment of Congress, the threshold burden imposed on census litigants should be no lower than that imposed on redistricting plaintiffs.

3. Respondents failed to demonstrate the Secretary's ability to make representation in Congress more equal by substituting the PES estimates for the enumeration census. Had respondents been able to make this showing, we would expect a much earlier, more forceful and more direct statement in their brief, repeated with as much frequency as they invoke the differential undercount, that the apportionment of Congress under the enumeration census was wrong and that the apportionment under the PES was at least "better," if not correct. Instead, respondents describe adjustment as "promot[ing] the goal" of equal representation for equal numbers of people, Resp. Br. at 66, or as an elephant that is larger than a horse, but smaller than a whale. *Id.* at 62.

Roughly a third of the way through their brief, respondents announce for the first time that Congress was malapportioned under the enumeration census, writing:

> The PES results showed too that the uncorrected census counts led to a malapportionment of the House of Representatives, with two seats erroneously assigned to Wisconsin

> and Pennsylvania that should *in fact* have gone to California and Arizona, respectively.

Resp. Br. at 27 (emphasis added).

It is very hard to find in respondents' brief, where this "fact" is demonstrated.[10] Neither the district court nor the court of appeals found that the PES apportionment gave either the correct apportionment or one better than the enumeration apportionment. The district court expressly found that respondents had failed to illustrate affirmatively the superior accuracy of the estimates at "any level mentioned in Guideline One [national, state or local], or . . . for any reasonable definition of accuracy" (Pet. App. 78).[11] The court of appeals described the adjusted numbers as resulting in an apportionment which

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[10]No record cite is given. Immediately following this assertion, respondents discuss the impact of estimated census errors on equality of representation in intrastate redistricting. *See* Resp. Br. at 26-27. Seven pages later, respondents identify the "final loss function analysis" as also showing "that the unadjusted counts are expected, approximately, to malapportion two more seats in the House of Representatives than are the adjusted counts." *Id.* at 33. Yet the same loss function analysis is later cited as showing Wisconsin's loss of a House seat to California, *id.* at 62 n.26, not Pennsylvania's loss and Arizona's gain of yet another seat. Loss function analysis is discussed at n.13, *infra*.

[11]Respondents rewrite the district court's decision to make the word "any", used twice, read "every." Resp. Br. at 46 ("The court's point was that guideline one required an affirmative showing of superior accuracy of the adjusted counts at *every* level and for *every* reasonable definition of accuracy . . . ." (emphasis added)). Wisconsin interprets the district court's statement as meaning what it says. While the district court found itself to favor the adjusted numbers, it recognized that an affirmative demonstration of their superiority at the national, state and local level had not been made. While not citing the burdens of proof in Art. I, § 2 redistricting cases, the court's finding was consistent with the Art. I, § 2 threshold standard requiring a redistricting plaintiff to demonstrate affirmatively the ability to draw districts with smaller population deviations.

was "just as accurate" as the President's apportionment, not in a better apportionment (Pet. App. 38).[12]

Thirty-five pages after announcing that Wisconsin and Pennsylvania were apportioned House seats "in fact" belonging to California and Arizona, respondents argue that California was in fact entitled to a seat apportioned to Wisconsin. Resp. Br. at 62. Here, respondents are more explicit in identifying the evidence they believe supports the claim.[13] It is natural to wonder what happened to

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[12]The court of appeals' statement that the Secretary had declined to make the adjustment "if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate" (Pet. App. 38), becomes, in respondents' brief, a statement by the court that the Secretary had declined to adjust "if there were any distributive consequence with respect to which an adjusted census 'would be different from . . ., although just as accurate,' as the unadjusted." Resp. Br. at 68 (quoting Pet. App. 38). For respondents, the apportionment of Congress is treated as "any distributive consequence[ ]" of the adjustment decision.

[13]Respondents note Wisconsin's loss of a seat to California under Professor Wachter's recalculation of state population estimates using modified modeling assumptions. Resp. Br. at 62 (*see* A.R., App. 3, K. Wachter Report, Table 2.1.). Wachter's estimates, in addition to being point estimates, were based on the PES data. Wachter did not take a new sample. At the time of the adjustment decision, PES data were known to contain significant measured and unmeasured bias. Correction of two subsequently discovered errors reduced California's population estimate by nearly 275,000 (DX 31, Attachments 2, 4). That flawed estimates were "robust" with respect to two states' apportionments hardly demonstrates that this gave the correct apportionment. The more important result of Wachter's calculations is that even if problems of bias and sampling error were ignored, the ability of statistical estimation to improve the apportionment of Congress was shown to be constrained by its extreme sensitivity to modeling assumptions.

Respondents also identify the Census Bureau's loss function analysis as "show[ing] that the unadjusted counts malapportion two seats more in the House of Representatives than do the adjusted," which they then suggest represent the "same seat from Wisconsin to California." Resp. Br. at 62 n. 26. Loss function analysis attempted to

Arizona, particularly given its status as the only respondent state capable of claiming additional representation under the statistical estimates.[14]

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measure the relative accuracy of the PES and enumeration census by comparing their results to a hypothetical "true" population distribution, referred to as the "target population" (Pet. App. 187-89; PX 42). The essence of the apportionment loss function procedure was to treat the target populations as giving the correct apportionment and then to compare this to the census apportionment and to multiple apportionments given, not by the PES population estimates, but by 1,000 simulations of the states' populations based on the PES. As noted in the Secretary's decision, this had the effect of eliminating the inaccuracies derived from using one particular set of adjustments (Pet. App. 189-90), even though, had the Secretary decided to adjust, only one set of adjustments necessarily could have been adopted. The actual apportionments given by the simulations were not reported, so it is not possible to know which states would have gained or lost representation (*see* PX 42, Tables 1, 2). The main point to be made is that the hypothetical "true" populations were not, and were known not to be, the true "true" populations. The generation of the target population "parcelled out" measured bias in the PES using 13 very broad categories called evaluation strata (Pet. App. 187). Moreover, the target population could not have corrected for the two subsequently discovered errors, accounting for nearly a fourth of the undercount estimate, since these were not known at the time. The consequence of this last fact is evident in a comparison of the states' hypothetical target populations and their population estimates after correction for the two errors. California's target population shown in PX 43, Table 1, was more than 250,000 higher than its corrected estimate; Arizona's target population was nearly 50,000 higher than its corrected estimated total; Wisconsin's target population was 22,000 less than its revised estimate (DX 31, Attachment 2).

[14]Respondents argue that there is no significance in the fact that California elected to be bound by the district court's judgment, stating that it would be an "odd consequence" for state residents to be put in a worse position "if their State joined their suit than if the State never participated at all." Resp. Br. at 62 n.27. There is nothing odd about the fact that a judgment binds a state which decides to join, or in the case of California, to initiate (J.A. 40 ¶ 10) a lawsuit, even though the state would not be bound if it had never commenced the action. That the right of apportionment in Congress is fundamentally a state right follows from the language of Art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States which may be included within

The June 1991 estimates that purportedly showed Arizona's and California's entitlement to additional representation in Congress were subsequently found to contain two errors, accounting for nearly one fourth of the original undercount estimate. *See* Resp. Br. at 35 n.14. The correction of these errors also changed the state population estimates. The revised estimated population totals for the four states whose apportionments are at issue were: California, 30,596,258; Pennsylvania, 11,916,496; Wisconsin, 4,921,509; Arizona, 3,745,518 (DX 31, Attachment 2).[15] Under the method of equal proportions, the four states' priority values to a fifty-third, twenty-first, ninth and seventh House seat, respectively, would have been: California, 582,812; Pennsylvania, 581,465; Wisconsin, 580,005; Arizona, 577,946.[16] What this reveals

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this Union . . . .") and Section 2 of the Fourteenth Amendment ("Representatives shall be apportioned among the several States according to their respective numbers . . . ."). It is also reflected in the apportionment statute, 2 U.S.C. § 2a(b) ("Each State shall be entitled . . . to the number of Representatives shown" in the Presidents' apportionment statement).

[15]To simplify the calculations, only the states' estimated resident populations are used. The calculation of the states' apportionment priorities would require including overseas personnel allocated to their apportionment counts. The 1990 overseas populations for the four states were: California, 79,229; Pennsylvania, 43,067; Wisconsin, 14,976; Arizona, 12,757. Source: *United States Department of Commerce News*, CB91-07 (Jan. 7, 1991), Table 5. Including overseas populations in the states' counts does not change the results shown in the text.

[16]The apportionment of Congress is given by the procedure known as the method of equal proportions. 2 U.S.C. § 2a(a). State priority values are calculated by dividing each state's population by the square root of the product of the number of the state's last House seat apportioned, times the number of the next seat sought. *See Montana*, 503 U.S. at 452 n.26. The divisor for determining California's priority to a fifty-third House seat is therefore the square root of the product of 52 and 53, or 52.497618; the divisor for Pennsylvania's claim to a twenty-first Representative is the square root of 20 times 21, or

is that the basis of Arizona's claim to a seventh House seat, originally resting on a single methodological decision regarding the treatment of sample variances during "smoothing" (Pet. App. 220), rests on the existence of two undiscovered PES errors. This does not represent "a substantive principle of commanding constitutional significance." *Montana*, 503 U.S. at 463.

It also reveals that if the corrected estimates represented the states' "true" populations, the Secretary could not have improved equality of representation in Congress by substituting the PES estimates available at the time of his decision for the enumeration census. California's purported malapportionment under the census would have been exactly offset by Pennsylvania's malapportionment under the PES.

The calculation also shows that if the corrected point estimates represented the states' "true" populations, California and Pennsylvania would have higher priority than Wisconsin to the two contested House seats. *See also* U.S. Br. at 18-19. But as respondents note, "[b]ecause it is based on a sample, the PES is inevitably affected by sampling error . . . . " Resp. Br. at 31. Within margins of error equal to plus or minus two times the states' reported standard errors (Tr. 2373-74), any of the three states could occupy the high, middle or low priority to the two contested seats.[17] Except by ignoring random sampling error,

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20.493901; the divisor for Wisconsin's claim to a ninth Representative is the square root of 8 times 9, or 8.4852813; the divisor for Arizona's priority to a seventh seat is the square root of 6 times 7, or 6.4807406.

[17]The revised standard error for California was reported to be 119,228; for Pennsylvania, 57,736; for Wisconsin 19,642 (DX 31, Attachment 2). Somewhat larger margins of error were reported with the June 1991 estimates (A.R. App. 10 (June 13, 1991, Release), Table 5 (state margins of error reported as percentages of estimated national population of 253,978,000: California, 0.1152% (292,583); Pennsylvania, 0.0484% (122,925); Wisconsin, 0.0161% (40,890)). Adding two times Wisconsin's revised standard error to its point estimate would make its population 4,960,793. Dividing this number by the square root of 72

California could not claim an additional seat in Congress, whether from Wisconsin or Pennsylvania.

There were, however, other serious sources of error in the estimates. Measured bias was found to account for one-third of the original undercount estimates (Pet. App. 180).[18] Other sources of non-sampling error, see n. 9, supra, warranted "escalating skepticism" (Pet. App. 78) of the PES results.

In sum, the PES did not endow the Secretary with the ability to improve the apportionment of Congress, but only to change it. The goal of equality of representation does not mandate that substantial evidence of sampling and non-sampling error be ignored or that a process as complex as the PES, executed under severe time constraints, be assumed not to hold errors not immediately apparent. To compel a change in the census five years after the apportionment of Congress can accomplish no more than an arbitrary reallocation of rights of political representation, at the cost of throwing state redistricting, and the ability of the states' citizens to elect representatives under established districts, into turmoil. Arizona's claim to additional representation in Congress is based on undiscovered errors in the PES. The claim of California, which elected not to appeal the district court's

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would give Wisconsin a priority value of 584,635 to a ninth House seat. This is higher than Pennsylvania's and California's priorities to a twenty-first and fifty-third seat, respectively, calculated using the states' point estimates. *See* pages 16-17 and n.16, *supra*. Subtracting two times California's standard error from its point estimate would make its population 30,357,802. Dividing this number by the state's equal proportions divisor for a fifty-third Representative would give a priority value of 578,270--below both Pennsylvania's and Wisconsin's point estimate priority values.

[18]Bias remained after the recalculation of the population totals following the correction of the two late-discovered errors. *See* CAPE Report at 15 (noting that between 22% and 45% of the revised undercount estimate of 1.58% actually reflected measured bias and not measured undercount); *see also* 58 Fed. Reg. 69, 75 (Jan. 4, 1993) (bias-corrected undercount estimated to lie between 0.9% and 1.2%).

judgment, would require sampling error to be ignored, as well as multiple sources of non-random error. The other respondent states are unable to claim additional congressional representation under the adjusted numbers. Respondents do not have an interest in compelling other states' redrawing their congressional and legislative districts. The respondent states' commitment to correcting the inequalities alleged to exist in their own districts is belied by their failure to draw new districts using the adjusted block-level data ordered released by the district court. This case does not involve protecting constitutional rights, but disregarding the express language of the Constitution, this Court's census and redistricting precedent and the statutes enacted by Congress directing the manner of taking the census.

CONCLUSION

The judgment of the court of appeals should be reversed and the judgment of the district court affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN, PETITIONER

v.

CITY OF NEW YORK, ET AL.

STATE OF OKLAHOMA, PETITIONER

v.

CITY OF NEW YORK, ET AL.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

DREW S. DAYS, III
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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1614

STATE OF WISCONSIN, PETITIONER

v.

CITY OF NEW YORK, ET AL.

No. 94-1631

STATE OF OKLAHOMA, PETITIONER

v.

CITY OF NEW YORK, ET AL.

No. 94-1985

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

Respondents concede (Br. 66-67) that in conducting the 1990 census, the Census Bureau made a "good-faith

effort" to achieve both "the most accurate count practicable" and "population equality." Respondents nevertheless contend that the Secretary of Commerce violated the Constitution when he declined to make a statistical adjustment of the census totals. As we explain in our opening brief (at 26-28), however, because the Constitution provides that the decennial census shall be made "in such Manner as they [the Congress] shall by Law direct," Art. I, § 2, Cl. 3—and because Congress in turn has assigned to the Secretary the responsibility for conducting the census "in such form and content as he may determine," 13 U.S.C. 141(a)—there is no basis for a court to compel revision of a census that was reasonably calculated to enumerate the Nation's population within a fair range of accuracy and that in fact counted 98.4% of the people. In particular, because respondents acknowledge that the census headcount was conducted in good faith, they have wholly failed to make the threshold showing that would be required under *Karcher* v. *Daggett*, 462 U.S. 725 (1983), to trigger heightened scrutiny of the Secretary's decision not to publish *other*, statistically adjusted population totals. See U.S. Br. 41. Thus, even assuming that the court of appeals correctly imported the *Karcher* framework into this quite different setting (but see U.S. Br. 39-40 & n.30) respondents' constitutional claim is without merit (see *id.* at 39-45).

In light of the fundamental soundness of the census itself, resolution of this case does not require a detailed analysis of respondents' various technical disagreements with the Secretary's judgment that a statistical adjustment was unwarranted. In any event, respondents' arguments lack merit. Respondents suggest that experts uniformly favored a statistical adjustment to the 1990 census and that the Secretary disregarded that consensus. In fact, numerous statistical experts, both inside and outside

the government, concluded that the proposed adjustment was not warranted, and many who supported adjustment recognized that reasonable statisticians could disagree. The Secretary's decision was based on a thorough and reasoned analysis of the competing views. The Secretary is charged by statute with conducting the census, and it is his decision—including his determination that the superior accuracy of the adjusted 1990 census figures had not been proved—to which the courts must defer. Respondents' invocation of the Constitution does not diminish the deference owed to that decision.

A. Respondents' principal argument (Br. 58) is that "'technical expertise' with respect to the census rests within the Bureau," and that "[t]he Secretary's decision, without contributions from nor review by the expert Bureau, was made in derogation of that technical expertise." Those contentions mischaracterize the record.

1. First, no expert consensus existed as to the advisability of adjusting the census: there was substantial disagreement on the issue within the professional community,[1] and the Secretary had access to a number of experts who were not persuaded that adjustment would improve the distributive accuracy of the census.[2] Within

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[1] Indeed, questions concerning the feasibility of adjustment had been raised from the outset. A March 3, 1988, letter sent by 11 professors of statistics and two professors of mathematics to the House Subcommittee on Census and Population stated that "[s]o far, the technical case for adjustment is weak." DX 89, at 2. The letter stated that "adjustment can easily introduce more mistakes than it fixes," and warned that "[o]ne egregious tactic" employed by some adjustment proponents "is to assert that there is a consensus of technical opinion favoring adjustment." *Id.* at 1, 2.

[2] Respondents give a highly one-sided account of the post-enumeration survey and the adjustment process. Thus, respondents downplay the significance (and problematic nature) of the "homo-

the Census Bureau, Peter Bounpane and Charles Jones had a combined 57 years' experience in the planning and

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geneity assumption" (see U.S. Br. 12-13), contending (Br. 19) that "[t]he assumption [behind post-stratification] was not that [individuals within a post-stratum] would share exactly the same [capture] probability, but rather that [they] would be more similar to one another (with respect to their likelihood of being counted in the census) than to individuals in other post-strata." Respondents' expert agreed at trial, however, with the statement that "[t]here is a further assumption that within each poststratum the probability of capture in the census is the same for all persons." Tr. 1658 (Dr. Stephen Fienberg).

Respondents also assert that "[t]he [post-strata] categories selected were the ones the Bureau had determined in its own research and in its review of research by other specialists to provide the greatest explanatory power in analyzing differences in undercount rates." Resp. Br. 18 (citing Tr. 513-514). The cited transcript pages do not support that proposition, and in fact there was substantial dispute as to whether the combination of variables chosen actually corrected the differential undercount in a way that made the adjusted numbers more accurate. In selecting geographic groupings for post-strata, for example, the Bureau simply employed its pre-existing census divisions. See Pet. App. 373. Dr. Wachter analyzed the results of an experimental re-poststratification, in which all demographic and place-type divisions of post-strata remained the same, but new (and more homogeneous) post-strata were defined by changing the state groupings. Tr. 2133; DX 44. The differences resulting from that experiment were substantial. Tr. 2138-2139; DX 44. In Dr. Wachter's view, those analyses demonstrated that adjustment fails the test imposed by Guideline Three that adjusted counts be robust to reasonable alternatives. Tr. 2142.

Respondents also state (Br. 29) that the Bureau's P-projects "showed that each of the measurable sources of error had been controlled, leaving survey results that could reliably be used to adjust"; but the Secretary explained in detail his disagreement with that conclusion. See Pet. App. 205-213; see also DX 1, at 902 (minority on Undercount Steering Committee was "concerned that the evaluation studies understate the level of error"); Tr. 2112-2125, 2156, 2175. And respondents make no reference to the smoothing and pre-smoothing processes and the uncertainties they introduced (see U.S. Br. 9-12).

evaluation of the census, and each had substantial statistical expertise. See DX 1, at 919, 923; Tr. 1719-1723, 1889-1890. As members of the Undercount Steering Committee, they disagreed with the Committee majority's conclusion that adjustment would improve the accuracy of the census, on the ground that "reasonably complete analyses of results have yet to be performed." DX 1, at 898.[3] The Secretary was also assisted by other statistical experts within the Commerce Department. The recommendation against adjustment of Under Secretary Dr. Michael Darby, Ph.D., was issued as Appendix Six to the Secretary's decision. See DX 1, at 965 *et seq.*[4]

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[3] Respondents state (Br. 34) that "seven of the nine members of the Undercount Steering Committee concluded that the adjusted counts were more accurate than the unadjusted and that the census should be corrected on the basis of the PES." In fact, although the Committee majority "conclude[d] that a statistical adjustment of the 1990 census leads to an improvement in the counts," DX 1, at 898, it made no recommendation concerning an adjustment. One member explained that the Committee did not make a recommendation because "the Census Bureau is a statistical agency" and the ultimate decision whether to adjust "includes other issues as well; legal policy and so on." Tr. 1767. Respondents also state (Br. 34) that the two dissenting members of the Committee "joined in the conclusion that adjustment would be proper for [certain] purposes and groups." The Committee's report stated that the dissenting members "would support the use of adjusted counts in the *intercensal* estimates program, and they believe that an alternative adjustment using the PES data to adjust for post-strata with large measured undercounts *might* be acceptable to them." DX 1, at 898 (emphasis added). The propriety of an intercensal adjustment (which would not affect representation) is not at issue in this case; and the possibility of an acceptable alternative adjustment could be of little relevance to the Secretary's decision, in light of the July 15, 1991, deadline and the pre-specification requirement (see U.S. Br. 6, 18 n.15).

[4] Under Secretary Darby had previously discovered a significant error in the Bureau's methodology, necessitating a correction that

Deputy Under Secretary Dr. Mark Plant, Ph.D., similarly concluded that adjustment "would not increase the accuracy of the census." Plant Dep., Vol. 2, at 19; see also *id.* at 23-24, 315. The Secretary also gave careful attention to the individual recommendations of the eight members of the Special Advisory Panel, four of whom advised against adjustment. See Pet. App. 258-319.[5] In short, there simply was "no consensus among statisticians and demographers that [adjustment] would make the state and district census totals—the level at which the adjustment would actually affect representation and funding—more accurate." *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1413 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992).[6]

2. Nor did the Secretary fail to consider the views of those who favored adjustment. After the Undercount Steering Committee prepared its majority and minority

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substantially affected the Bureau's analysis. Tr. 1956-1957; See page 8, *infra*.

[5] Respondents contend (Br. 36-37, 38 n.18) that the four members of the Special Advisory Panel who recommended against adjustment were opposed to adjustment from the time of their appointment, and that "the Secretary failed to explain why a deadlock that was preordained had any bearing on the merits of his decision." The first contention is factually unsupported. See Tr. 2292 (Dr. Wachter testified that at the time of his nomination to the Panel he was "skeptical that adjustment could work" but that he "came to the position, let's * * * see how it all goes out, what will the data show"). And the Secretary did not simply rely on the *fact* of disagreement among the Panel members; he evaluated the competing views, and explained in considerable detail his reasons for finding some members more credible than others. Pet. App. 258-319.

[6] Since the Seventh Circuit's decision in *Tucker*, the scholarly debate has continued. See, *e.g.*, 9 Stat. Sci. 458-537 (1994) (compilation of papers and rejoinders); *Adjusting the Census of 1990: An Exchange*, 34 Jurimetrics J. 59-115 (1993) (compilation of articles).

reports, the Secretary met personally with proponents of both positions within the Census Bureau. DX 75; Tr. 1769-1770, 1908-1909. In his final decision, the Secretary described in extensive detail the adjustment methodology chosen by the Bureau and the arguments in favor of adjustment advanced by Bureau officials and some members of the Special Advisory Panel. Even Bureau officials supporting adjustment acknowledged that the issue was not clear-cut. Thus, Census Bureau Director Barbara Bryant prefaced her recommendation with the observation that "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." J.A. 73. Senior Mathematician Robert Fay similarly supported adjustment but told the Secretary that "reasonable statisticians could differ on this conclusion." Tr. 1909.[7]

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[7] Based on subsequent research, Dr. Fay testified at trial that he no longer advocated the adjustment proposed for the Secretary's consideration in July 1991. Tr. 1920-1921; see U.S. Br. 38. Respondents characterize (Br. 43 n.20) Dr. Fay's testimony as asserting "that, after an additional year of research, he believed other adjustments of greater accuracy could be made." That is not what Dr. Fay said. He testified that he had not made up his mind whether he would favor an adjustment of the 1990 census figures. Tr. 1921. Dr. Fay explained that the Census Bureau's CAPE Committee (see U.S. Br. 4-5) was continuing to consider the question whether a statistical adjustment should be used in computing intercensal population estimates, and that the Committee was "looking earnestly at whether alternative adjustments of the census, avoiding the problems that I have described in my [research] paper, might produce an acceptable means of accounting for undercount as we produce post censal estimates." Tr. 1921. Census Bureau Director Bryant subsequently decided against adjustment of the intercensal figures. 58 Fed. Reg. 70 (1993). In any event, Dr. Fay's willingness (in May 1992) to hold out the possibility that an acceptable adjustment methodology might be devised in the future scarcely casts doubt upon the Secretary's July 1991 decision.

Respondents' contention that the Secretary rejected a settled expert consensus is particularly unpersuasive in light of the uncertain state of the record at the time the Secretary was required to act. The Undercount Steering Committee's June 21, 1991, report estimated that the proportional shares of 11 States would be made worse by adjustment. The loss function on which that estimate was based failed to account, however, for the variability of the estimates created by the smoothing and pre-smoothing processes (see U.S. Br. 9-12), a fact pointed out first by Commerce Department Under Secretary Darby. Tr. 1956-1957; see note 4, *supra*. When that omission was brought to the Bureau's attention, it conducted a second loss function analysis. This time, the Bureau concluded that the proportional shares of 21 States would be made less accurate by adjustment, and that two-thirds of the population resided in States whose shares would be made more accurate. DX 1, at 913; J.A. 81. That conclusion was communicated to the Secretary in an Addendum issued on June 27, 1991, and in Census Bureau Director Bryant's recommendation issued the following day—less than three weeks before the Secretary was required by the stipulation to announce his decision for or against adjustment. See Pet. App. 190; J.A. 70, 81. The Addendum stated that "the overall committee position has not changed regarding adjustment, but has been weakened somewhat." DX 1, at 916. The Addendum also noted that "[w]hen additional information * * * becomes available, the committee acknowledges that it may strengthen or weaken its conclusions." *Ibid.*

The Secretary viewed the revised loss function analysis as still skewed toward adjustment, however, because the variances it used had been understated (by the Undercount Steering Committee's own estimation) by a factor in the range from 1.7 to 3. He determined that, if

the variances were increased by a factor of 2, a figure at the low end of the Bureau's range, "the proportional shares of about 28 or 29 states would be worsened by an adjustment in terms of distributive accuracy." Pet. App. 191. The Secretary reasonably concluded that "[t]here is certainly not sufficient evidence to reject the distributive accuracy of the census counts in favor of the adjusted counts." *Id.* at 201. He also noted that he was "deeply concerned that if an adjustment [wa]s made, it would be made on the basis of research conclusions that may very well be reversed in the next several months." *Id.* at 248. That concern proved to be warranted. Subsequent research demonstrated that errors (including a computer coding error) had led to a significant overestimation of the net national undercount, with potential consequences for the apportionment of Representatives among the States. See U.S. Br. 4-5, 18-19.[8]

3. Respondents err in suggesting (Br. 58-60 & 61 n.25) that Secretary Mosbacher's lack of statistical training

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[8] If the corrected adjusted figures were used for a reapportionment, Wisconsin would lose a Representative and California would gain one, but the number of Representatives allotted to Arizona and Pennsylvania would remain unchanged. See U.S. Br. 18-19. No party before this Court is in a position to press for an adjustment using those figures, since California chose not to appeal the district court's judgment sustaining the Secretary's decision. See U.S. Br. 19 n.16, 30 n.23. Although governmental respondents that would obtain additional federal funds as a result of an adjustment may satisfy the injury-in-fact requirement for Article III standing (cf. Resp. Br. 63 n.27), they have no judicially enforceable right to an adjustment on that basis because (1) judicial review of the decennial census totals is not available under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (see *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2773-2776 (1992)); (2) those respondents have no constitutional claim of their own (*id.* at 2776); and (3) there is no reason to depart from the usual prudential rule against invoking the constitutional rights of a third party. See U.S. Br. 30 n.23.

affects the deference owed to his resolution of technical issues. The Secretary is directed to "take a decennial census of population * * * in such form and content as he may determine," 13 U.S.C. 141(a), and his authority to "determine" the "form and content" of the census necessarily encompasses the authority to evaluate scientific evidence bearing on the propriety of a statistical adjustment. Respondents cite no authority suggesting that the *curriculum vitae* of a particular agency head bears on the legal standard to be employed by a reviewing court. Cf. *Morgan* v. *United States*, 304 U.S. 1, 18 (1938) (it is "not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required"); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

B. Guideline One provided that the unadjusted census figures would "be considered the most accurate count of the population of the United States, at the national, State, and local level, unless an adjusted count is shown to be more accurate." Pet. App. 151.[9] Respondents

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[9] The Secretary's final decision stated that "[a]n adjustment to the census is a fundamental change in the way we count and locate the persons residing in the United States." Pet. App. 150. Respondents point out (Br. 4-5) that statistical imputation techniques were used in the 1970 and 1980 censuses to estimate occupancy rates for housing units for which reliable information was unavailable. Respondents suggest (Br. 4) that the statistical adjustment proposed for the 1990 census is simply "another refinement" of an established practice. In fact, the proposed adjustment at issue here, which would have effected a change in the count for every occupied block in the country, is of a wholly different order of magnitude from the limited use of imputation techniques in prior censuses. When plaintiffs sought to compel a statistical adjustment to the 1980 census, the district court rejected a similar argument, concluding that "none of those adjustments in 1970 were even remotely similar to the types of wholesale adjustments

acknowledge (Br. 52) that the Secretary acted properly in giving precedence in his adjustment decision to distributive rather than numeric accuracy—that is, in focusing primarily on "getting the proportional distribution of the population right among geographical and political units" rather than on seeking the most accurate count of the total national population. Pet. App. 184; see U.S. Br. 14, 30-31. Respondents contend, however, that the Secretary employed an irrational approach in comparing the distributive accuracy of the adjusted and unadjusted figures. Specifically, respondents argue (Br. 55) that the Secretary (1) "focused on applications of the criterion of distributive accuracy that were unrelated to any use of census data," and (2) utilized an irrational methodology in comparing the distributive accuracy of the adjusted and unadjusted numbers at the state level.[10] Neither contention has merit.

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presently suggested by the plaintiffs." *Cuomo* v. *Baldrige*, 674 F. Supp. 1089, 1107 (S.D.N.Y. 1987).

[10] Respondents also state that the Secretary "regarded evidence of superior numeric accuracy as 'not relevant' to the determination of distributive accuracy" (Br. 39 (quoting Pet. App. 201)), a conclusion they characterize (Br. 52) as lying at the "determinative core" of the Secretary's decision. To begin with, respondents misconstrue the passage they quote, which states that "[w]hile the preponderance of the evidence leads me to believe that the total population at the national level falls between the census counts and the adjusted figures, that conclusion is not relevant to the determination of distributive accuracy." Pet. App. 201; see also *id.* at 147. The Secretary's statement that the unadjusted figures are too low and the adjusted figures too high obviously is not equivalent to a statement that adjustment would improve numeric accuracy. Indeed, the quoted passage was so non-determinative, and so peripheral, that respondents did not even mention it in their briefs in the court of appeals.

Although the passage quoted by respondents is not on point, it is doubtless true that the Secretary saw a real and substantial possibility

1. There is no basis for respondents' contention (Br. 55) that "the Secretary never considered analyses bearing on the superior accuracy of the adjusted counts for apportionment and districting." The Secretary emphasized that his focus on distributive rather than numeric accuracy was grounded in the constitutional purpose of the census, which is to apportion Representatives among the States, and in the other uses of the census,

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that a statistical adjustment could increase numeric accuracy while impairing distributive accuracy. Respondents suggest (Br. 39) that this conclusion was itself irrational, noting that "the Bureau has chosen to introduce innovations to maximize numeric accuracy because it has always recognized that improving numeric accuracy is the clearest way to improve distributive accuracy." Insofar as improved *enumeration* techniques are concerned, the two usually will go hand in hand. The enumeration process itself involves the identification of actual people and the places where they live: improvements in that process are therefore likely to provide a more accurate picture of the distribution of the population. There is, as the Secretary found, no similar basis for confidence that the statistical adjustment at issue here, which alters the population figures for every occupied block in the country based on a sample comprising less than 2% of the total population, will likewise improve distributive accuracy.

In our opening brief we state that "[e]ven a dramatic undercounting of the total population would not be inconsistent with the goal of fair apportionment if each State's share was accurately determined." U.S. Br. 30-31. Respondents dispute that proposition, offering a lengthy historical discursion that concludes (rather anticlimactically) with the observation (Br. 54 n.23) that "[o]nly under a method of apportionment such as the method of equal proportions (Hill method) is it true (and then only for congressional districts much larger than 30,000) that an evenly distributed undercount will not change the apportionment of Representatives." The method of equal proportions has been used for every apportionment from 1930 to the present, see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-452 (1992), and the average congressional district contains 572,466 persons, *id.* at 445. The government stands by the statement in its opening brief.

including intrastate redistricting and the distribution of federal funds. Pet. App. 141, 161, 184-185, 200-201. His ultimate conclusion was that "for the Constitutional purposes of the census the available evidence is consistent with the census counts being more accurate than the adjusted counts." *Id.* at 201. In theory, Guideline One might have led the Secretary to reject a proposed adjustment that was conceded to increase distributive accuracy at the state level if the Secretary had concluded that the unadjusted figures were superior at the local level. It is clear, however, that the Secretary's application of Guideline One did not in fact lead to that result. Rather, the Secretary stated that in his view "the census counts are the most accurate count of the population of the United States at the State and local levels." *Ibid.*[11]

2. In explaining that the superior distributive accuracy of the adjusted figures had not been demonstrated, the Secretary stated that, when realistic estimates of the relevant variances were used, the available evidence indicated that "the proportional shares of about 28 or 29 states would be worsened by an adjustment in terms of distributive accuracy." Pet. App. 191; see page 9, *supra*.

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[11] Respondents chide the Secretary (Br. 40) for "cit[ing] the results of a Bureau loss function analysis of distributive accuracy for the 23 cities in metropolitan areas of 500,000 or more." To suggest that this passing reference was the "focus" of the Secretary's decision-making process (see *ibid.*) misreads the decision. In any event, although the question whether the adjusted or unadjusted numbers more accurately estimate Chicago's population vis-a-vis that of Los Angeles (see *ibid.*) is not dispositive of any representation or funding decision, it is surely *relevant* to assessing the reliability of the adjustment mechanism. For example, both the Undercount Steering Committee and Census Bureau Director Bryant attached some significance to their view that adjustment would generally improve proportional accuracy for places with a population of over 100,000. See DX 1, at 903; J.A. 81.

In respondents' view (Br. 41), the Secretary thereby "disregarded the sizes of errors," permitting "large gains in accuracy (with significant practical consequences) [to] be offset by small losses in accuracy (with little or no practical significance)." Contrary to that contention, however, determining the most appropriate measure of accuracy in these complex circumstances, and the best manner in which to weigh the respective (and competing) equities of the several States, requires exercise of precisely the sort of judgment that is entrusted to Congress and the Secretary under the pertinent constitutional and statutory provisions. It was, at the very least, "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2777 (1992), for the Secretary to attach significance to the prospect that the relative shares of a majority of States would actually be made less accurate by an adjustment. As respondents point out (Br. 42), Dr. Freedman testified at trial that, although the counting of States in that manner "does give you some information," he did not think it "is such a good way" to measure distributive accuracy. See Tr. 2445.[12] But both the Undercount Steering Committee

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[12] Contrary to respondents' contention (see Br. 42, 54, 67), the government did not "conced[e]" in the court of appeals that the Secretary's reliance on the number of States whose proportional shares would be worsened was not "valid." In its brief below, the government simply noted (at 47 n.16) the testimony of Dr. Freedman that we quote here, while also noting that the technique was used by the Undercount Steering Committee, Census Bureau Director Bryant, and the Secretary. Similarly without merit is respondents' contention (see Br. 42, 55) that the Secretary's methodology was denounced by the Secretary's own expert witness (Dr. Freedman) as "borderline unreasonable." At trial, Dr. Freedman was presented with a hypothetical situation in which the actual population of each of five States was known, and in which the proportional shares of two of the States would

and the Census Bureau Director based their recommendations in favor of adjustment in substantial measure on their belief that adjustment would render more accurate the proportional shares of a majority of States. See DX 1, at 903, 913; J.A. 81. The Secretary can hardly be faulted for attaching significance to the same comparison.

C. Contrary to respondents' contention (Br. 57-58), the justifications for deference to an agency's technical and policy determinations—the superior expertise and resources of agency officials, and respect for the decision of Congress to assign a particular matter to an administrative body—are fully applicable to the adjudication of constitutional questions.[13] There is no general rule that

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be made substantially more accurate by adjustment, while the shares of the other three would be made marginally less accurate. Tr. 2507. In response to a question whether a decision against adjustment in that situation would be "borderline unreasonable" (albeit without stating on "which side of the border" the decision would fall), Dr. Freedman answered: "That's fair." *Ibid.* Dr. Freedman did not regard the hypothetical example as functionally equivalent to the decision actually faced by the Secretary; to the contrary, he characterized the hypothetical as "unrealistic" in significant respects. Tr. 2507, 2540. Dr. Freedman never characterized the Secretary's approach to the problem actually at hand as "borderline unreasonable." Although he acknowledged that the Secretary had "made some mistakes, as anyone would," Tr. 2356, he agreed that the Secretary had considered the relevant questions "in a rational way," *ibid.*; see also Tr. 2380, and he agreed with the Secretary's ultimate conclusion that "[t]here is certainly not sufficient evidence to reject the distributive accuracy of the census counts in favor of the adjusted counts," Tr. 2358.

[13] Respondents seek (Br. 57) to distinguish this Court's prior decisions requiring judicial deference to an agency's technical decisions, on the ground that those cases were brought under statutes authorizing only limited judicial review. However, the Census Act's authorization to the Secretary to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. 141(a), is a broad and open-ended delegation that, as a general rule, would foreclose judicial

federal courts must resolve de novo all issues bearing on the ultimate disposition of a constitutional claim. To the contrary, federal courts adjudicating constitutional issues frequently defer (or accord a presumption of correctness) to subsidiary determinations made by actors better positioned to resolve particular questions. *E.g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2471 (1994) (opinion of Kennedy, J.); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49-50 (1938) (NLRB's factual findings concerning jurisdiction over employer under Commerce Clause reviewable to determine whether supported by "adequate evidence"); cf. *FPC* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575, 586 (1942) ("The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas.").[14] Moreover, appellate courts, including this Court, regularly defer to the factual findings of federal district courts even where those findings are determinative of a constitutional claim. See, *e.g.*, *Maine* v. *Taylor*, 477 U.S. 131, 144-145 (1986).

In this case, judicial deference is required by the text of the Constitution. The provision centrally relevant to this case states that the "actual Enumeration" shall be made "in such Manner as [Congress] shall by Law

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review altogether. See 5 U.S.C. 701(a)(2) (judicial review barred where matter "is committed to agency discretion by law"); see U.S. Br. at 18-27, *Franklin* v. *Massachusetts* (No. 91-1502).

[14] See also *Jackson* v. *Virginia*, 443 U.S. 307, 318-319 (1979) (although Constitution requires that criminal conviction be based on proof beyond a reasonable doubt, question for reviewing court is not whether court believes that proof was sufficient, but whether any reasonable jury could conclude that applicable evidentiary standard was met); *Thompson* v. *Keohane*, 116 S. Ct. 457, 463-465 (1995) (federal court adjudicating habeas corpus application must accord presumption of correctness to state court findings of fact).

direct." Art. I, § 2, Cl. 3. The fact that population figures are used to apportion Representatives among the States (and thus indirectly affect voting) does not permit a court to second-guess the "Manner" in which Congress (through the Secretary) has conducted the census.

D. As we explain in our opening brief (at 45), establishment of an equal protection violation based upon racial discrimination requires proof of a discriminatory purpose. *Washington* v. *Davis*, 426 U.S. 229, 239-245 (1976).[15] Contrary to respondents' suggestion (Br. 70), we do not contend that a showing of intentional racial discrimination is a necessary predicate of *every* equal protection claim. Without showing intentional racial discrimination, a plaintiff challenging a State's districting decisions may prevail by showing that differences between the populations of individual districts within the State are "not the product of a good-faith effort to achieve population equality" as nearly as practicable,

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[15] Respondents do not contend that Secretary Mosbacher's 1991 decision was tainted by intentional racial discrimination. But respondents do hint at a nefarious motive for the Commerce Department's initial 1987 decision against adjustment; they rely on a May 1987 intradepartmental memorandum that listed "adjustment problems" and predicted that "States with large minority populations would benefit from an adjustment and states with small minority populations would lose." Resp. Br. 21 (quoting PX 574, attached memorandum at 1). Read as a whole, however, the memorandum clearly did not suggest that the expected benefit to States with high minority populations was itself a "problem." The point instead was simply that an adjustment would have predictable winners and losers, and that "[n]o matter which party is in power, it is quite likely that there will be those who will charge the Bureau or the Department with fraudulent motives for adjusting the counts." PX 574, attached memorandum at 3. As matters developed, the correlation between a State's minority population and its gain or loss from adjustment was far less clear than the 1987 memorandum anticipated. See note 17, *infra*.

unless the State demonstrates that "the population deviations in its plan were necessary to achieve some legitimate state objective." *Karcher*, 462 U.S. at 740. The significant differences between apportionment of Representatives among the States and the process of intrastate districting counsel against mechanical application of the *Karcher* framework here. Even assuming that the *Karcher* analysis applies by analogy, however, the Secretary clearly made a good-faith effort to maximize equality of representation (*i.e.*, distributive accuracy) as nearly as practicable. See U.S. Br. 39-45.[16]

E. Respondents seek to prevail without showing *either* a discriminatory motive *or* unnecessary deviations between the size of districts in different States. They contend (Br. 71) that even if "the Secretary was genuinely in doubt about the comparative accuracy of the two counts or found the two counts equally erroneous, his choice of the count in which inaccuracy is systematically concentrated among minorities instead of the count in which inaccuracy is non-systematically distributed throughout the population would warrant strict scrutiny." Respondents' disparate impact claim is incon-

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[16] Under *Karcher*, the Secretary could be found not to have made a good-faith effort to maximize equality of representation only if (1) the Secretary had determined that the adjusted figures would increase distributive accuracy but had nevertheless declined to make an adjustment (see U.S. Br. 43), or (2) the Secretary's determination that the adjusted figures had not been shown to be more accurate was irrational (see *id.* at 45). For the reasons stated in text and in our opening brief, neither of those propositions is sustainable. Respondents attempt to establish the lack of a good-faith effort by impeaching the integrity of Secretary Mosbacher, contending (Br. 70) that the Secretary's actions evinced an unwillingness to give serious consideration to adjustment. The district court correctly and emphatically rejected a similar argument. See Pet. App. 62-63 n.16.

sistent with this Court's precedents and is unsupported by the record.

1. This Court has previously considered equal protection challenges to electoral devices, such as multimember districting and at-large voting systems, that do not create districts of unequal size but that are alleged to have an adverse effect on voters of a particular race. The Court has "required plaintiffs to demonstrate that the challenged practice has the *purpose* and effect of diluting a racial group's voting strength." *Shaw* v. *Reno*, 113 S. Ct. 2816, 2828 (1993) (emphasis added) (citing cases); see also, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 618-619 (1982). The requirement that plaintiffs demonstrate discriminatory intent "is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause." *Id.* at 619 (quoting *Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion)). The legal standard announced in *Washington* v. *Davis* is thus applicable to controversies bearing on the right to vote.

2. In any event, respondents failed at trial to show that the decision against adjustment had an adverse effect upon the electoral power of minority voters. The constitutional purpose of the census is to apportion Representatives among the States, not to allocate representation or financial benefits among racial or other demographic groups. The decision against adjustment therefore harms minority residents only to the extent that States with disproportionately high minority populations would have been credited with higher shares of the country's population if the proposed adjustment had been made. As we note in our opening brief (Br. 48-49), however, respondents made no comprehensive effort at trial to demonstrate that this was so. Thus, even if a disparate impact upon minority residents furnished a basis for a

constitutional challenge, respondents have failed to offer the requisite proof.[17]

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded with directions to enter judgment for petitioners.

DREW S. DAYS, III
Solicitor General

DECEMBER 1995

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[17] Respondents state (Br. 26) that "undercounting was concentrated in areas where minorities are concentrated—in California, Texas, Florida and other states of the Southwest and South and in major cities across the country." California, Texas, and Florida do have high minority populations, see Bureau of the Census, Department of Commerce, *State and Metropolitan Area Data Book 1991*, at XIV-XV (4th ed. 1991) (*Data Book*), and all three States would have been credited with larger shares of the country's population if adjusted figures had been used. See A.R., App. 10, Table 5. On the other hand, States such as Illinois, New Jersey, and New York also have large minority populations, see *Data Book*, at XIV-XV, and all three would have lost population share if the proposed adjustment had been made. See A.R., App. 10, Table 5. Respondents assert (Br. 27) that higher than average undercounts also occurred in northeastern cities such as New York, Chicago, Detroit, Baltimore, and Washington, D.C. They fail to note, however, that the States in which four of those five cities are located—New York, Illinois, Michigan, and Maryland—would lose population share under the proposed adjustment. See A.R., App. 10, Table 5. Two experts have determined, in fact, that "[u]rban blacks have an undercount three times that of the rest of the population, according to the PES; but 55% of them live in states that would lose population share if the adjustment were implemented." D. Freedman & K. Wachter, *Rejoinder*, 9 Stat. Sci. 527, 537 (1994).

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BRIEF OF U.S. SENATORS HERB KOHL, ARLEN SPECTER AND RUSSELL FEINGOLD AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Herb Kohl, Arlen Specter and Russell Feingold are United States Senators who, as citizens, legislators and members of the Senate Committee on the Judiciary, share a direct interest in the integrity of the census.[1] The decision, by a divided panel, of the court of appeals in *City of New York v. U.S. Department of Commerce*, 34 F.3d 1114 (2nd Cir. 1994), *cert. granted*, 64 U.S.L.W. 3238 (Sept. 27, 1995), questions not only that integrity but the countless decisions made, since 1991, by local, state and federal governments relying on the census for its accuracy and fairness.

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[1] Senator Kohl was, until 1993, the Chairman of the Subcommittee on Government Information and Regulation of the Senate's Committee on Governmental Affairs, which has oversight jurisdiction of the census.

A decision by this Court to affirm the court of appeals would lead, inexorably, to a reapportionment of the Congress and, directly, to the mid-decade loss by Wisconsin and Pennsylvania of seats in the U.S. House of Representatives and their corresponding votes in the electoral college. *Id.* at 1122. Moreover, the harsh consequences of the court of appeals' decision would reach every level of government and every citizen for they have properly relied, for the last four years, on the accuracy of the 1990 census to conduct the public's business and to ensure "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

The principal petitioner and the principal respondent have consented to the filing of this brief, and their letters of consent are on file with the Clerk of the Court pursuant to Rule 37. With the United States and the States of Wisconsin and Oklahoma (in Case Nos. 94-1614 and 94-1631, respectively, which have been consolidated with this case), amici request that this Court reverse the decision of the court of appeals, thereby affirming the district court's judgment and the 1991 decision by the Secretary of Commerce that declined to use statistical sampling to adjust the results of the census.

SUMMARY OF ARGUMENT

The Constitution, in Article I, section 2, mandates an "actual enumeration" of the country's population every 10 years. The census serves two related and equally compelling purposes: to count the population and to locate the people of this country by state and political subdivision. The results of the census determine the apportionment of the House of Representatives, the number of presidential electors for each state, the shape of state legislative districts, and boundaries for county and city elections. In addition, Congress and the executive branch rely on the decennial census to allocate federal funds to state and local governments. The census, in this federalist

system, provides nothing less than distributive fairness in a country of 250 million people.

The census is an enumeration, an individual count under the Constitution of the "whole number of persons in each state," not a statistical survey or poll. And it is imperfect. Long before the 1990 census, there was controversy over whether statistical sampling procedures should be used to adjust the results for the miscounting that occurs in every census. For at least 50 years, concern has grown about undercounting, particularly "differential undercounts" (higher undercount rates for certain racial and ethnic minority groups than for non-minorities). That has led to repeated proposals, repeatedly rejected by Congress and the courts, to alter or statistically "adjust" the decennial census data to "improve" their accuracy.

The precise number of people and their distribution within the United States can never be determined with absolute certainty. The size of the country, its heterogeneity, and the mobility of its population over a large area make that impossible. Some people are unwilling to be counted while others are unable to complete the census forms. Given the complexity and inherent imperfection of any census, the question for this Court is whether the administrative decision not to adjust the 1990 census was within the range of choices constitutionally available to the federal government through the Department and Secretary of Commerce. Indeed, the dispositive question is not whether there was an undercount, but whether it is possible to "remedy" an undercount without damaging the accuracy, the credibility and the distributive fairness of the census.

Any decision to adjust the census cannot be based solely on the possibility, or even the certainty, that the statistically-adjusted result might reflect more accurately the *total* population of the country or any particular state. Adjusted totals must, if they are to supplant the census, reflect as well a more accurate distribution of the relative

population among the states, counties, cities, wards, and precincts of the United States. The Secretary's decision in 1991 to leave the census intact rested on persuasive evidence that the proposed adjustments failed to improve—and, indeed, probably would undermine—the accuracy of the population distribution among the states. The court of appeals improperly applied strict scrutiny to the Secretary's decision, mistakenly equating a dispute over "equal representation" with a dispute between statisticians. Yet under *any* standard of review, strict or deferential, the Secretary's decision should be affirmed.

The proposed adjustment at issue here would sacrifice distributive accuracy—"fairness," the district court said, *City of New York v. U.S. Department of Commerce*, 822 F. Supp. 906, 924 (E.D.N.Y. 1993) (*City of New York III*)—on the altar of an unattainable statistical ideal for the country as a whole. The adjustment would "count" six million unidentified people yet "discount" more than 900,000 people actually counted and identified by the census. If the census were now adjusted, the record suggests the population of 29 states arguably would be more accurately reflected, but the population count in the remaining 21 states would become less accurate and, accordingly, less fair. Administrative decisions can turn on these statistical distinctions, but constitutional decisions should not.

PROCEDURAL BACKGROUND

Statistical adjustment, which has had its advocates since the 1950s, first became a major issue for the 1980 census. *See* JENNIFER D. WILLIAMS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, DECENNIAL CENSUS COVERAGE: THE ADJUSTMENT ISSUE 5 (1994) (the "CRS Report"). On May 13, 1980, the Secretary of Commerce directed the Census Bureau to decide whether to adjust the 1980 census results. Declining to do that, the Bureau maintained that its "coverage improvement programs had been successful and that there was no accurate method available to adjust the population data."

Id. at 6. The Bureau stressed the need for continuing research on undercount measurement. *See* U.S. Library of Congress, *Adjusting the 1990 Census*, p. 6.

Following the announcement, more than 50 lawsuits were filed, most asking the courts to order the census statistically adjusted. In one case, *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980), *decided sub nom., Cuomo v. Baldridge*, 674 F. Supp. 1089 (S.D.N.Y. 1987), the State of New York alleged that, because of the 1980 undercount of African-Americans and Hispanics, it lost a congressional seat and millions of dollars in federal funds. The court affirmed the Census Bureau's conclusion that adequate census adjustment methodology had not been developed. *Id.* at 1107; *see* U.S. Library of Congress, *Adjusting the 1990 Census*, p. 7.

For the 1990 census, the Census Bureau created an Undercount Steering Committee and staff to address the undercount issue. The Bureau also solicited opinions on adjustment from outside experts and organizations including the American Statistical Association and the National Academy of Sciences. *See City of New York III*, 822 F. Supp. at 913-14. On October 30, 1987, however, the Commerce Department announced that it did not intend to adjust the 1990 census for a number of reasons, including the inherent subjectivity and questionable reliability of the adjustment process.

Within a year, the plaintiffs sued to enjoin the 1990 census, challenging its methodology and seeking to reverse the administrative decision against adjustment. The Department of Commerce, its Secretary, the Census Bureau, President George Bush and other public officials, all defendants, moved to dismiss the case, but the U.S. District Court for the Eastern District of New York concluded that the plaintiffs had standing to challenge the census on constitutional grounds. *City of New York v. U.S. Department of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989) (*City of New York I*). The district

court also ruled that it would review the Secretary's decision not to adjust the 1990 census under the "arbitrary and capricious" standard of review established by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982) ("APA"). *See City of New York I*, 713 F. Supp. at 54.

The parties ultimately agreed that the Commerce Department would vacate its 1987 decision against the prospective census adjustment—provided that Robert A. Mosbacher, then Secretary of Commerce, would decide by July 15, 1991 "*de novo* and 'with an open mind' whether adjustment was warranted." *City of New York III*, 822 F. Supp. at 915. The stipulation acknowledged the Commerce Department's program to gather the statistical data necessary for an adjustment, and the Department established "guidelines" for the Secretary's decision. With the stipulation, the parties also created an eight-member Special Advisory Panel of statistical and demographic experts with the plaintiffs naming four of the experts.

The plaintiffs then challenged the Department's guidelines as vague and inadequate and sought a declaratory judgment that a statistical adjustment would not violate the Constitution or any federal statute. The defendants again responded that the plaintiffs' challenge presented a nonjusticiable political question. In *City of New York v. U.S. Department of Commerce*, 739 F. Supp. 761, 767-68 (E.D.N.Y. 1990) (*City of New York II*), the district court again rejected the political question defense and concluded that statistical adjustment *per se* would not violate the Constitution or federal law.

On July 15, 1991, with the case pending, Secretary Mosbacher announced that the 1990 census would not be adjusted. *See* 56 Fed. Reg. 33582 (the "Decision"). Appearing before the census subcommittee of the House of Representatives' Committee on the Post Office and Civil Service, Mosbacher testified that "[a]fter a thorough review, I find the evidence in support of an adjustment to

be inconclusive and unconvincing." *Oversight Hearing to Review Census Adjustment Decision: Hearing Before the Subcomm. on Census and Population of the House Comm. on the Post Office and Civil Service*, 102d Cong., 1st Sess. 13 (1991) (testimony of Robert A. Mosbacher).[2]

The district court tried the case for more than two weeks in 1992, hearing a wide variety of testimony and evidence. In an April 13, 1993 decision, Judge Joseph M. McLaughlin declined to overturn the Commerce Department's decision against adjustment and held that the Secretary's decision, construed in light of constitutional requirements, was not "so beyond the pale of reason as to be arbitrary or capricious." *City of New York III*, 822 F. Supp. at 929.

On July 6, 1993, the plaintiffs appealed the decision to the U.S. Court of Appeals for the Second Circuit. Vacating and remanding the district court's decision, the appellate court concluded last year that "given the concededly greater accuracy of the adjusted count, the Secretary's decision was not entitled to be upheld without a showing by the Secretary that the refusal to adjust the census was essential to the achievement of a legitimate governmental objective." *City of New York*, 34 F.3d at 1124. This Court granted the petitions for a writ of certiorari on September 27, 1995.

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[2] Following the Secretary's decision not to adjust the 1990 census, the States of Wisconsin and Oklahoma intervened as defendants in the New York district court case. Wisconsin had filed suit in the U.S. District Court for the Western District of Wisconsin to enjoin the proposed adjustment, but the state voluntarily dismissed the case following the Secretary's decision. *State of Wisconsin v. U.S. Department of Commerce*, No. 91-C-0542-C (W.D. Wis. 1991).

ARGUMENT

The court of appeals erred, fundamentally, when it characterized the Secretary's decision as conceding the "greater accuracy of the adjusted count." In fact, the Secretary's only concession was to acknowledge the obvious: the statistical adjustment might well improve the total count for some purposes and in some areas, but for many—if not most—purposes, the census itself provided the more accurate count. Ultimately, the Secretary concluded that the evidence in support of an adjustment was both inconclusive and unconvincing:

> In attempting to make the total count more accurate by an adjustment, the relative count among the states would become less accurate with about 21 states adversely affected.
>
> Many large cities received less accurate treatment under an adjustment.
>
> Fully one third of the population lives in areas where the *census* appears more accurate and, as population units become smaller, the adjusted figures become increasingly unreliable.
>
> And, finally, when the Census Bureau made allowances for factors not yet estimated, the census enumeration in 28 or 29 states became less accurate "as adjusted."

Decision at 1-1 - 1-5. Any one of these factual conclusions, standing alone, would support the Secretary's conclusion and the district court's decision affirming it. Taken collectively, however, the facts more than meet even the Second Circuit's demanding (and erroneous) requirement that the decision not to adjust the census be "essential" to achieve a legitimate governmental objective. The Secretary's decision not to adjust the 1990 enumeration applies and protects the constitutional principles of fairness, accuracy and integrity that underlie the decennial census.

I. THE PROPOSED ADJUSTMENT WOULD NOT, IN FACT, MAKE THE CENSUS MORE ACCURATE.

An adjustment is not a recount. It is, at best, an estimate—albeit an educated one—about who was missed in the actual census. There is a general consensus among statisticians and demographers who oppose adjustment that the process of estimating the undercount is, itself, very uncertain. Assuming that minorities were disproportionately undercounted, in a census that actually counted more than 98 percent of the population, then they will likely be undercounted at even higher rates in a post-census survey that samples a much smaller segment of the population. That is particularly true where, as here, the post-census survey depends entirely on census employees canvassing residential areas rather than on individual household participation in the process.

There have been many attempts—in Congress and in the courts, before and after the 1990 census—to require the Census Bureau to adjust the census results to "correct" the undercount. The two other circuits that have addressed this issue agreed with the district court in this case.[3] No attempt had succeeded until the Second Circuit's decision, and with good reason. The director of the census may have put it best: "Adjustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." BARBARA EVERITT BRYANT, RECOMMENDATION TO SECRETARY OF COMMERCE ROBERT A. MOSBACHER ON WHETHER OR NOT TO ADJUST THE 1990 CENSUS 3 (1991) (the "Bryant Report"). That is precisely why the Secretary's administrative decision should stand and the census should remain intact.

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[3] *See City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 1217 (1994); *Tucker v. U.S. Department of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 407 (1992).

A. The Enumeration Is Accurate.

The 1990 census counted 248,709,873 people in the "actual enumeration" required by the Constitution. In his report to the Secretary of Commerce, one member of the Special Advisory Committee summarized the critical difference between the census itself and the proposed adjustment:

> Adjustment numbers are no more than estimates, just as the Census numbers are estimates. The difference is that Census estimates are based on a physical count—at least some sort of reality—while adjusted numbers are not. Since the Census correctly enumerated 98.8% of the population—a percentage that is well within the margin of error for a survey of this size—there is no reason to use an adjustment that has a greater margin of error.

J. MICHAEL MCGEHEE, REPORT TO SECRETARY ROBERT A. MOSBACHER ON THE ISSUE OF ADJUSTING THE 1990 CENSUS 3 (1991) (the "McGehee Report").

The first step in the 1990 decennial census was an enumeration, an attempt actually to count every person residing in the United States on April 1, 1990 by mailing census questionnaires to addresses compiled by the Census Bureau. Residents were asked to complete the questionnaire and return it by mail. To independently evaluate and assess the quality and coverage of the census, the Census Bureau used two statistical measurements: the post-enumeration survey (the "PES") and a demographic analysis (the "DA").

The PES is a sample survey developed in the 1980s to provide additional geographic and ethnic information about the people missed in the census. The Census Bureau conducted a survey of approximately 165,000 housing units in 5,290 census blocks or small block clusters shortly after the 1990 census. Interviewers went to every household on the sample blocks to collect basic information.

These survey records were then matched against the census data for those blocks to determine who had been missed or erroneously included in the census. Following the matching process, the Census Bureau developed undercount factors for 1,392 groups based on census division, type of place of residence, tenure of residence, race, ethnicity, gender, and age. Decision at 2-13. Using an intricate combination of statistical models, the Bureau then drew inferences about the number of people missed by the census and their location. The Secretary's ultimate decision not to adjust the census was based, in part, on the uncertain quality of the PES and the inferences drawn from it.[4]

The second population measurement, demographic analysis, takes information from administrative records (previous censuses, birth and death certificates, and immigration and emigration forms) to develop an independent estimate of the population at *a national level.* Historically, both this type of post-census research and surveys like the PES had been used only for evaluation purposes and to plan the next census rather than, as proposed here, for adjusting the most recent one. *See* Bryant Report at 5.

The official 1990 census of the resident population (the civilian plus U.S. Armed Services population living in the United States) counted 248.7 million people. The Census

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[4] The PES methodology attempts to count people twice, in selected areas, and then compares the results from one count and set of records (the census) with the results from the other count and set of records (the PES compiled by interviewers):

> As a result, not only do the enumeration errors affect the quality of both sets of numbers, but the problems associated with matching records between the PES and the Census must also be taken into account; e.g. Do women match better than men?; Do matchers in Kansas City do a better job than those in Albany?; . . . Are there more people to match in Albany than in Kansas City?

McGehee Report at 10.

Bureau's estimates from its demographic analysis indicated a net undercount of about 4.7 million people, almost 1.9 percent of the total population. The Bureau's estimates from the PES initially suggested a net undercount of 5.3 million or 2.1 percent of the 1990 total population. Subsequent research and the discovery of a computer error, however, revised the PES undercount to just 1.6 percent of the population. *See* CRS Report at 11-12.

There is an obvious difficulty in using PES or DA-based data to "correct" any undercount in the 1990 census—the corrections suggested by each method are substantially different and, indeed, contradictory. A PES adjustment to the census would move many subpopulation totals in precisely the opposite direction of an adjustment based on demographic analysis:

- An adjustment based on the PES will add 180,318 non-black males age 19 while the DA suggests that 136,908 be deleted from the count.
- A PES adjustment will delete 91,631 males over the age of 65 while DA would add 192,950.
- An adjustment based on the PES will add 375,053 females age 10-19 while DA indicates that 7,141 should be deleted.
- While DA indicates that 146,255 females over the age of 45 should be added, the PES would delete 245,253 of them.
- An adjustment based on the PES would add 1,055,826 more females than would DA. If the demographic analysis were correct, and the enumeration adjusted, the official population would have a .82 percent overcount of females imbedded in it.

See Decision at 2-10, 2-12.

In his decision, the Secretary found another comparison disturbing: every group of black males (except those age

10-19) was substantially undercounted by the PES when compared with DA. Accordingly, the PES-based undercount rates are substantially smaller. An adjustment based solely on PES would add 804,233 black males to the population while, under demographic analysis, the number of black males that theoretically should be added to the population is 1.33 million. For black females, the PES adjustment would add 29,390 fewer people. Even assuming for purposes of argument that DA estimates are more precise, however, DA could not be used to add the people missed by the PES to the census count because there is no way to determine where—in what state or county or city—to locate them. *See id.*

Ultimately, Secretary Mosbacher decided that neither accuracy nor fairness—both vital to the credibility and effectiveness of the decennial census—would be enhanced by the application of either a PES- or DA-based adjustment:

> [I]ncreased accuracy for census counts means not only increased accuracy in the *level* of the population, but also increased accuracy of the *distribution* of the population in states and localities. In particular, for the primary uses of the census—apportionment and redistricting—the share or fraction of the total population in a given state, city or precinct is critical. It is this fraction that determines political representation and the amount of Federal funds allocated across political jurisdictions. The paradox is that even if you improve the accuracy in the *level* of the population in any given city by adding at least some of the people missed in the census, you do not necessarily improve and can worsen accuracy in the *share* of the population in that city.

Id. at 2-11 (emphasis in the original).

Although the 1990 census may have undercounted several million Americans, no one can say with any confidence where those people are. The PES did *not* sample individual states or counties or cities. Without that infor-

mation, statistical surveys provide little reliable information to adjust the census fairly to reduce the impact of under-enumeration, or other sampling errors, at the national, state or local level.

After his July 15, 1991 decision, the Secretary testified at several congressional hearings that there simply was insufficient statistical precision in the adjusted counts to warrant their use instead of the original enumeration. That was at the heart of his decision. There was expert consensus, the Secretary said, that the adjusted numbers were less accurate on the block level. Even at the state level, moreover, there was uncertainty about which was more accurate, the original census or the adjusted counts. Referring to the people missed by the census, Secretary Mosbacher noted that the "implicit assumption" in adjusting the count is that "they are spread over the country in the same way as the post-adjustment population." Yet, he said, that "assumption has no empirical foundation." *Id.*

The Census Bureau analysts essentially concentrated on whether there was sufficient information to reduce the error in the numeric counts—without regard to whether that increased or decreased the severity of differential undercounts across geographical areas. "That is," the Secretary said, "they interpreted accuracy as concerned with getting the number of people closer to the truth rather than getting the allocation of the population for the purposes of political representation and funding closer to the truth." *Id.* at 2-24. The adjusted counts were less accurate than the enumeration, the Secretary concluded, and distributive accuracy would actually be impaired if the census were adjusted:

> [T]he Constitutional and legal purposes for the census must take precedence, and accuracy should be defined in terms of getting the proportional distribution of the population right among geographical and political units. This argues for putting aside the judgment of accuracy based on getting absolute num-

> bers right (numeric accuracy) and instead focusing on the question of whether there is convincing evidence that the accuracy of the population distribution in the adjusted numbers (distributive accuracy) is superior to the distributive accuracy of the actual enumeration.

Decision at 2-25. Senator Kohl reiterated precisely that point in his statement to the Senate Committee on Governmental Affairs on November 13, 1991: "[T]he most important question is this, can we prove that adjusted Census numbers are more accurate than the original numbers? Unless that question can be answered with an unequivocal yes[,] it would be *irresponsible and unfair* to adjust the numbers." (Emphasis added.) *Dividing The Dollars: Issues in Adjusting Decennial Counts and Intercensal Estimates for Funds Distribution, Hearing Before the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs,* 102d Cong., 2d Sess. 20 (1992) (statement of Sen. Kohl).

At a minimum, the first guideline adopted by the Department of Commerce for the census establishes a rebuttable presumption that the unadjusted census figures provide the most accurate count. The burden of proof falls on the proponents of "adjustment" to demonstrate otherwise.

> The Census shall be considered the most accurate count of the population of the United States, at the national, State and local level, unless an adjusted count is shown to be more accurate.

Decision at 2-5. The mandate of this guideline is unambiguous. In the absence of evidence establishing that adjusted estimates are more accurate than the census—at the national, state and local level both in relative and in absolute terms—the census counts are presumed more accurate. The Secretary of Commerce found that evidence wanting or unavailable in 1991, and it remains so today.

In affirming Secretary Mosbacher's decision not to adjust the 1990 Census, Judge McLaughlin emphasized the importance of distributive fairness:

> The Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits. . . . [T]he Secretary's concern that "with respect to places under 100,000 population, there is no direct evidence that adjusted counts are more accurate" was legitimate, given Guideline One's requirement that the adjusted counts be shown to be more accurate at the local level. Decision at 2-30.

City of New York III, 822 F. Supp. at 924. The census is not an academic exercise, in other words, but a constitutional responsibility of the federal government that literally shapes the political and social structure of this country. Census decisions are reviewable in that context, whether under the APA or a more demanding standard, not as part of the search for statistical perfection.

B. Adjustment Produces More, Not Less, Uncertainty.

The procedures proposed to adjust the census are novel, experimental at best. *See* Decision at 1-7. "Such research deserves and requires careful professional scrutiny," Secretary Mosbacher concluded, "before it is used to affect the allocation of political representation." *Id.* State demographic officials responding to a 1991 poll on the adjustment issue overwhelmingly opposed adjustment. A smaller group of statisticians and demographers were evenly split on adjustment—for, against, and undecided—with one expert quoted as describing adjustment, candidly, as "a statistician's sandbox." *Adjustment Again? The Accuracy of the Census Bureau's Population Estimates and the Impact on State Funding*

Allocations, Hearing Before the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. 3 (1992) (statement of Sen. Glenn).

Following the decision not to adjust the 1990 census, the Senate's Governmental Affairs Committee concluded that:

> There is no new information to suggest that adjusting the census is any more accurate or feasible now than it was last July [1991]. Since then we have discovered that the adjusted numbers published at that time were incorrect. Thus we conclude that accurately adjusting the census to correct for the undercount is not possible.
>
> . . . .
>
> In sum, the post-enumeration survey should be viewed as a major experiment in understanding the characteristics and geographic distribution of persons missed in the census. That experiment should be evaluated in an effort to reduce the undercount in the 2000 census. . . . [T]he time available in 1990 was insufficient to both develop the adjustment model and carry out the complicated procedures required by that model. Rather than lock onto a model that is inherently flawed, the PES can be used to develop models for future use that are more robust and less sensitive to minor changes in assumptions.

Dividing The Dollars: Issues in Adjusting Decennial Counts and Intercensal Estimates for Funds Distribution, Report Prepared by the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. 3 (1992). J. Michael McGehee, a member of the Advisory Panel, explained in his report that the problem with statistical census adjustments was that the verification of results had proven that "adjustment formulas were highly inaccurate. Twenty-six Census Bureau studies of the Post Enumeration Survey . . . and Demographic Analysis . . .

which form the Dual System Estimate (DSE) methodology[,] have shown that they are no more accurate than current Census practices." *See* McGehee Report at 2.

In concluding that the 1990 census should not be adjusted, the Secretary considered the shortcomings generally inherent in statistical formulations—that any statistical formula attempting to establish precise populations would be based on assumptions, assumptions that are subjectively chosen and weighed, assumptions that might be wrong. In addition, the Secretary considered the fact that adjusted numbers are no more than estimates and—unlike the enumeration, which is based on an actual count—entirely the product of statistical inferences with no correspondingly direct basis in reality.

Since statistical assumptions are the foundation upon which confidence in the "final" adjustment rests "[a] politically 'better' count cannot be defended if it is shown that the assumptions on which it rests are changeable." *Id.* at 6. Even small changes in statistical models result in different population estimates. Consider the results of two adjustment processes released by the Census Bureau on June 13, 1991. Although the technical differences between them were minor, the differences in results were substantial and, in terms of apportionment and equal representation, extraordinary.

Under one plan, two seats in the House of Representatives moved while under the other method only one seat moved. *See* Decision at 1-5. Similarly, one expert found that among five reasonable alternative methods of adjustment, none of the resulting apportionments of the House of Representatives were the same, and 11 different states either lost or gained a seat in at least one of the five models. *Id.* at 1-5 - 1-6. In view of these facts, Secretary Mosbacher found it unsettling that a subjective choice of statistical methodology can create such a dramatic practical difference in apportionment. *Id.* at 1-6.

The only acceptable rationale for a decision to adjust the census would be to correct a demonstrable inequity. No inequity can be corrected, however, unless the statistical quality of the numbers can be assured. That is not possible with respect to the 1990 adjustment because those numbers rely on statistical methods that are untested, unstable and unverifiable. Dr. Michael R. Darby, then Under Secretary of Economic and Statistical Affairs and one of the Advisory Panel members, summarized the decision not to adjust in familiar terms:

> [M]y conclusion was that it certainly was not proven that the adjustment would improve the accuracy, and it may well worsen the accuracy and treat people less fairly.
>
> . . . .
>
> If we miss four million people and we don't know where they live, putting them into some other block than where they live doesn't really help them or help fairness. Some people get too much and other people still get too little, and it can make things worse.

Review and Evaluation of Secretary Mosbacher's Decision on the 1990 Census Adjustment, Hearing Before the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs, 102d Cong., 1st Sess. 9-10 (1991) (statement of Dr. Darby).

II. ADJUSTMENT WOULD DISCOURAGE CITIZEN PARTICIPATION IN THE CENSUS AND ENCOURAGE THE POLITICIZATION OF THE CENSUS.

The success of the 1990 census, based on a mail out/mail back format, depended on the widespread and voluntary participation of the people. *See Baldridge v. Shapiro,* 455 U.S. 345, 354 (1982). The most accurate method for locating and counting the people of the United States is to ask each household to submit information about the number of people living there. When people fail to submit the requested information, the Census Bu-

reau must send enumerators (field workers) to canvass neighborhoods house-to-house to learn how many people live in each one. Data collected by enumerators can never be as accurate as data submitted voluntarily. *See* U.S. GENERAL ACCOUNTING OFFICE, DECENNIAL CENSUS: 1990 RESULTS SHOW NEED FOR FUNDAMENTAL REFORM 3 (1992) (the "GAO Report"). As voluntary participation in the census declines, there is necessarily greater dependence on data collected by enumerators. The more data enumerators have to collect, however, the more likely they are to miss and miscount people, and the more inaccurate the census becomes.[5] *Id.* at 47. Accordingly, the GAO concluded, "[a] high level of public cooperation is the key to obtaining accurate data at a reasonable cost." *Id.* at 35.

A Any Statistical Adjustment Would Lead To Declining Participation In The Census.

The Secretary decided not to adjust the 1990 census based, in part, on his concern about the effect an adjustment would have on future census participation:

> [A]n adjustment would remove the incentive of states and localities to join in the effort to get a full and complete count. The Census Bureau relies heavily on the active support of state and local leaders to encourage census participation in their communities. Because census counts are the basis for political representation and federal funding allocations, communities have a vital interest in achieving the highest possible participation rates. If civic leaders and local

[5] Low participation leads to increased costs as well as errors. Voluntary participation by mail in the 1990 census was lower than in previous censuses and, as a result, the Census Bureau had to hire over 300,000 enumerators. *See* GAO Report at 45. That follow-up is expensive: in constant dollars, the Census Bureau spent 65 percent more on the 1990 census than on the 1980 census. *Id.* at 4. The increasing costs of the census are due, at least in part, to declining participation. *Id.* at 24.

> officials believe that an adjustment will rectify failures in the census, they will be hard pressed to justify putting census outreach programs above the many other needs clamoring for their limited resources.

Decision at 1-6 - 1-7.

> Currently, it is in the interests of every governor, mayor, and interest group to help get their target populations counted. . . . The[ir] efforts include mapping, address compilation, massive advertising campaigns, and public awareness activities . . . [that] are absolutely critical to the Census Bureau's mission to conduct an actual enumeration. . . . [A]n adjustment would remove the incentive that these public officials and groups currently have to provide active support in achieving a complete count.

Id. at 2-59. "Without the partnership of states and cities in creating public awareness and a sense of involvement in the census," the Secretary concluded, "the result is likely to be a further decline in participation." *Id.* at 1-7.

The 1990 census provides a stark example of how adjustment would penalize a high rate of census participation. Prior to the census, Wisconsin undertook a statewide public awareness campaign and targeted outreach program that resulted in the highest census participation of any state. The state's efforts included a matching grant program aimed at traditionally undercounted groups. *See* Nancy Hurley, *Winding Up Wisconsin's Census Efforts*, WISCONSIN COUNTIES, Dec. 1990, p. 36 ("Hurley"). To qualify for grants, municipalities submitted proposals targeting "hard-to-enumerate" groups including racial and ethnic minorities, people with limited English-speaking ability, the homeless, migrant workers, homebound individuals, students and people living in public housing or other concentrations of rental units. *See Wisconsin's Census Awareness Campaign*, THE 1990 CENSUS, A WISCONSIN HANDBOOK, p. 17.

As a result, Wisconsin had the highest voluntary census mail response rate in the country: 75 percent of the Wisconsin households that received a census questionnaire in the mail completed and returned the form, compared with about 64 percent nationwide. *See* Hurley at 36. Yet despite that accomplishment, formally recognized by the Census Bureau, the state stands to lose a seat in the House of Representatives and a portion of its share of federal funds if the census is adjusted. *City of New York*, 34 F.3d at 1122. The state would suffer that loss precisely *because* of its relatively low estimated undercount compared with other states. Faced with this example, how many state and local officials will choose to allocate their declining resources to programs designed to encourage participation in the next census?

The Census Bureau can estimate how many people were missed or erroneously included in the census, but it has no way of knowing where those people actually live. Accordingly, local officials in many census subdivisions will have even less reason to encourage citizen participation because it would reduce the high error rates that the adjustment process otherwise would "assume" affected their counts. Those error rates would lead to a higher estimated population under an adjusted census and, thus, a greater share of political representation and federal funds.

The statistical adjustment rejected by the Secretary uses sampling methods to assign people, assumed erroneously included or omitted from the census, to specific geographic areas. That process is based on the known error rate in counting similar people in similar communities within the same census division, though not necessarily the same state. Thus, an area with particularly high error rates will drive up the error rates imputed to all of the communities within the same census division. Since the census results for those communities would then be adjusted to show additional people, com-

munity leaders would be foolish to risk greater political representation and federal funding by encouraging the very participation that will reduce the error rates.

Adjustment also threatens public confidence in the census, adversely affecting citizen participation. The public no doubt will question why the government spent $2.6 billion to conduct a head count that produced results inaccurate enough to require "adjustment" by a statistical formula. Adjustment necessarily implies that the census itself is significantly flawed, that the federal government has unwisely spent tax dollars, and that there is no need to be counted voluntarily because statisticians eventually will "count" everyone even if they choose not to participate in the census. Ultimately, the reduced accuracy and diminished integrity of the census will erode public confidence in government, lead to lower citizen participation and, in turn, to a further decline in census accuracy and to doubling the cost of the next decennial census.[6]

B. Statistical Adjustment Would Permit Political Manipulation.

Another concern raised by the Secretary was the possibility of political manipulation. Any adjustment methodology selected by the Census Bureau involves a number of subjective assumptions. As the assumptions vary, the results vary:

> [T]he choice of the adjustment method selected by Bureau officials can make a difference in apportionment, and the political outcome of that choice can be known in advance. I am confident that political considerations played no role in the Census Bu-

[6] If the trend in public cooperation continues, the national mail response rate could be as low as 55 percent in the year 2000. This would generate a corresponding increase in the Census Bureau's workload of nearly 50 million cases. Under this scenario, the Bureau's planning staff has estimated, the 2000 census could cost $4.8 billion in current dollars. *See* GAO Report at 41.

> reau's choice of an adjustment model for the 1990 census. I am deeply concerned, however, that adjustment would open the door to political tampering with the census in the future.

Decision at 1-6. Depending on the assumptions in a particular statistical model, the resulting adjustment will literally move Congressional seats from one state to another:

> Adjustment of census numbers, as it is devised at this point, is unfortunately subject to not only the charge but the actual fact of political manipulation. . . . The present adjustment process is subject to many "inside" assumptions and innumerable decisions by individuals about where to draw the sample, how to determine the various strata, what mathematical formulae to use, to name only a few of the important decisions. *It is certainly not hard to imagine that such a process, especially when cloaked in the mysteries of statistical complexity, could easily be corrupted and manipulated, particularly if it should become accepted practice and not subject to rigorous public examination, as is the case for the present decision.* (Emphasis in original.)

V. LANCE TARRANCE, JR., REPORT TO THE SECRETARY OF COMMERCE 29 (1991).

No individual can affect the outcome of the census enumeration, nor could the federal government directly manipulate adjusted census counts for political gain. "By contrast, a statistical adjustment of the census involves discretion in the selection of methods that can produce a wide variety of results. This permits government officials to know the political outcome of the chosen method in advance." MICHAEL R. DARBY, RECOMMENDATION TO THE SECRETARY ON THE ISSUE OF WHETHER OR NOT TO ADJUST THE 1990 DECENNIAL CENSUS, E-1 (1991). The concerns expressed by these and other experts justify the Secretary's decision. Rather than embark on a path

of unknown political possibilities with adjustment, he determined that the federal government's efforts and resources would be better spent developing a census-taking procedure that would reduce the problem of differential undercounts.

III. THE RELIEF GRANTED IN THIS CASE, IF ANY, SHOULD BE PROSPECTIVE.

This Court should reverse the court of appeals and remand the case to be dismissed with prejudice. If this Court nevertheless affirms the court of appeals' decision, any relief granted here or, on remand, by the district court, should be prospective. Indeed, any relief granted should be effective with the year 2000 census.

A retrospective adjustment of the 1990 census would disrupt program allocations and program planning for many states—at both the state and local level. State, county and municipal agencies use decennial census data for the planning and management of health and human service programs as well as for other "need" and "population" based programs. Political districting and political representation at the state and local levels have already been put in place based on the 1990 census data.

Many states, including Wisconsin and Pennsylvania, have allocated funds based on the 1990 census data. To change the base of the census numbers in mid-decade would significantly disrupt the delivery of social services, particularly in those states that would lose a substantial amount of federal funds. Litigation soon would follow, no doubt, to recover funds "overpaid" since 1991. Using the General Accounting Office's estimates of fiscal impact, for instance, Pennsylvania would lose $40 million and Wisconsin $15 million in federal funds annually if the census were adjusted. Shifting millions of dollars in federal aid from states that have relied on the 1990 census figures, when the Census Bureau itself concedes that sta-

tistical adjustment would not accurately reflect populations at subnational levels, would be imprudent and harsh.

The political impact would, if anything, be even more draconian. Testifying against adjustment before a Senate subcommittee, Wisconsin's Attorney General explained that the proposed "adjustment would unduly disrupt and delay the established political process":

> An adjusted census would require my State and other States to scrap that [local and state redistricting] process and start over with different population data. Such a change would result in confusion and delay for Congressional, State, county, city, town and village redistricting across the country. Indeed, we would run the risk of not completing our reapportionment work on time for the next election.

The Case Against Adjustment: The 1990 Census, Hearing Before the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs, 102d Cong., 1st Sess. 4 (1991) (statement of James Doyle, Attorney General, Wisconsin). And that was four years ago.

The reapportionment, by every state legislature, of their own legislative districts and every state's Congressional districts inevitably spawned an avalanche of federal court cases that only now are reaching this Court. *See, e.g., Miller v. Johnson*, —— U.S. ——, 115 S. Ct. —— (1995). Those disputes, whatever the issues and whatever the outcome, have assumed the constitutional accuracy of the 1990 census. To permit the district court even to consider, on remand, the possibility of retrospective relief would create a political and judicial nightmare.

The Census Bureau conceived the PES to help it do a better job of counting the people of America. The Bureau already has incorporated the results of the PES and its other post-census surveys into the planning for the year 2000 census. In fact, the next census may be

remarkably different than the 1990 census in concept and in methodology. Any relief granted the respondents in this case similarly should be directed to making the next census better and not to revisiting the last census—with all of the problems that would entail.

CONCLUSION

The apportionment of seats for the House of Representatives is done by "equal proportions," and redistricting within the states and the allocation of federal funds all rest on distributing the population into areas that are approximately equal. Accuracy for the decennial census requires the most accurate *proportional* distribution of the population across the country. Placing greater importance on distributive rather than numeric accuracy, the Secretary of Commerce correctly concluded that the "adjusted" data became less reliable below the national level, and the census numbers became more reliable. Accordingly, for the constitutionally mandated purposes of the census, the adjusted numbers are not only less accurate but less fair than the actual census count.

For these reasons, this Court should reverse the decision of the court of appeals.

Respectfully submitted,

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No. 94-1614, 94-1631, 94-1985

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

WISCONSIN, Petitioner

v.

CITY OF NEW YORK, et al., Respondents

[Caption Continued on Inside Cover]

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATE OF OKLAHOMA, Petitioner

v.

CITY OF NEW YORK, et al., Respondents

UNITED STATES DEPARTMENT OF COMMERCE, et al., Petitioners

v.

CITY OF NEW YORK, et al., Respondents

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INTEREST OF THE AMICUS CURIAE

The respondents seek to compel an "adjustment" to the census results which, if translated into a mid-decade reapportionment of Congress, would cost Pennsylvania one seat in the House of Representatives and in the Electoral College, Pet. App. 87. Pennsylvania would, in that case, have to re-draw its congressional districts. In addition, because Pennsylvania bases its own state legislative districts upon the "official reporting of the Federal decennial census," Pa. Const., Art. 2, §17, an adjustment to the census results might also require a mid-decade redistricting of the Pennsylvania General Assembly. Finally, Pennsylvania believes that the decision of the Court of Appeals, if allowed to stand, will turn every census into an occasion for endless litigation, prolonged political turmoil, and ultimately, loss of public confidence in the representative branches of government--results which Pennsylvania, along with the rest of the States, has an interest in avoiding.

SUMMARY OF ARGUMENT

The Court of Appeals erred by importing into this case the standard of heightened scrutiny adopted in cases such as *Wesberry v. Sanders*, 376 U.S. 1 (1964), involving state redistricting. Instead, the Court should continue the course set in *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992) and *Department of Commerce v. Montana*, 503 U.S. 442 (1992), in which the Court deferred to the decisions of the responsible federal officials unless those decisions were inconsistent with the language of the Constitution. Under this standard, the Secretary's decision not to "adjust" the census count should not be disturbed.

1. It is extremely doubtful that the type of "adjustment" contemplated in this case is even permitted by the Constitution. The Constitution requires that the census be an "actual Enumeration" of the persons "in each State," but the adjustment contemplated here is neither. It is a statistical manipulation of the actual census count, in which some people who were actually counted are dropped while other people are counted twice; and in which the totals for each State are based on people who live in other States.

2. In any event, the Constitution does not require this adjustment, which would be a fundamental change from the practice of the last 200 years. There is no clear evidence that this adjustment would improve the accuracy of the census in the only constitutionally relevant sense: improving the fairness of the apportionment of the House of Representatives among the States. On the other hand, this adjustment would expose the census to the perception--and the reality--of partisan manipulation to achieve a preferred result, and might well undermine support for the census itself.

3. The standard used by the Court of Appeals, which is derived from this Court's redistricting cases, is not well-suited to the very different problem presented by this case.

It will involve the courts in areas well beyond their institutional competence; it rests on factual assumptions which have not been demonstrated; and it invites endless litigation over the census itself and consequent redistricting. This will undermine the legitimacy not just of the census itself, but of the representative branches of government whose composition depends upon the census.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE THE SECRETARY OF COMMERCE TO "ADJUST" THE CENSUS COUNT.

The Secretary of Commerce decided, after extensive deliberation, Pet. App. 135-416, not to "adjust" the census count. Pennsylvania submits that the proper standard for reviewing that decision should be derived from *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992), and *Department of Commerce v. Montana*, 503 U.S. 442 (1992), and not from state redistricting cases such as *Wesberry v. Sanders*, 376 U.S. 1 (1964), and its progeny. In *Franklin* and *Montana*, the Court held that constitutional claims involving the census and the reapportionment of Congress are justiciable. *Franklin*, 112 S.Ct. at 2776 (census); *Montana*, 503 U.S. at 459 (reapportionment). In both cases, however, the Court recognized that the Constitution entrusts these tasks, in the first instance, to other branches of government, whose decisions are entitled to considerable deference from the courts.

In *Franklin*, the Court began by recognizing that the decennial census is to be conducted "in such Manner as [Congress] shall by Law direct," *id.*, 112 S.Ct. at 2771, *quoting* U.S. Const., Art. I, §2, cl. 3 (bracketed matter the Court's), and that Congress in turn has authorized the Secretary of Commerce to take the census "in such form and manner as [s]he may determine." *Franklin*, 112 S.Ct. at 2771, *quoting* 13 U.S.C. § 141(a)(bracketed matter the Court's). The Court ended by asking simply whether the Secretary's decision was "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S.Ct. at 2777.

In *Montana*, the Court recognized Congress' broad authority to reapportion itself among the States, and

recognized as well that the *Wesberry* standard of "complete equality for each voter," *Montana*, 503 U.S. at 463, has little usefulness outside of the context in which it arose--drawing district lines *within* a State. "Neither mathematical analysis nor constitutional interpretation provides a conclusive answer....The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course." *Ibid.* Congress' choice among courses is thus entitled to "far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Id.*, at 464.

Pennsylvania submits that the Court should decide this case in the same way that it decided *Franklin* and *Montana*: by asking whether the Secretary's decision is "consistent with the constitutional language and the constitutional goal of equal representation," while recognizing that the Constitution and Congress have entrusted the Secretary with broad discretion in conducting the census, and that there may well be more than one constitutionally permissible course for the Secretary to choose. Viewing the Secretary's decision against this standard, Pennsylvania has no doubt that the District Court was correct in refusing to disturb it.

1. Turning first to the constitutional language, Pennsylvania has considerable doubt that the "adjustment" contemplated by the respondents is even permitted, let alone required, by the Constitution. As the Court observed in *Franklin*,

> Article I, §2, cl. 3 of the Constitution provides that Representatives "shall be apportioned among the several States ... according to their respective Numbers," which requires, by virtue of §2 of the Fourteenth Amendment, "counting the whole number of persons in each State."

> The number of persons in each State is to be calculated by "actual Enumeration," conducted every 10 years, "in such manner as [Congress] shall by Law direct." U.S. Const., Art. I, §2, cl. 3.

112 S.Ct. at 2770-71. The adjustment contemplated, however, would not be an "actual Enumeration," nor would it count the number of persons "in each State."

On the first point--that the adjustment would not be an "actual Enumeration"--the Secretary pointed out that the adjustment is *not* a process of finding actual persons who were missed by the census and adding them into the count.

> [M]any civic leaders are under the impression that an adjustment will fix a particular problem they have identified--for example, specific housing units or group quarters that they believe we missed. It does not do so.

Pet. App. 144. Rather, the adjustment is a statistical manipulation of data to generate a new population estimate; it does this, essentially, by dropping from the total some people who were actually counted, and by counting other people twice.

> [A]n adjustment ... would add over 6 million unidentified people to the census by duplicating the records of people already counted ..., while subtracting over 900,000 people who were actually identified and counted.

Ibid. This is not what most people would describe as an "actual Enumeration."

Moreover, the adjustment is reached by extrapolating to communities, States, and the Nation the results of a relatively small sample of 5,000 blocks. Pet. App. 56-57. Thus, as the Secretary said, by definition the adjustments for any particular community "are often based largely on data gathered from communities in other states." Pet. App. 144. The result would be that,

> for the first time, the apportionment [of the House of Representatives] would not be determined solely on the basis of the number of persons within each State's borders....For example,...the certified population count for Delaware would depend on the results of the [sample] in Maryland, the District of Columbia, West Virginia, Virginia, North Carolina, South Carolina, Georgia and Florida.

Pet. App. 251-52. This, Pennsylvania submits, would contravene the Fourteenth Amendment's command that the apportionment of the House be based on the number of persons "in each State."

2. Even if the Constitution does not positively forbid this kind of adjustment in the census count, it surely does not require it. Subjecting the results of the census' "actual Enumeration" to this kind of statistical manipulation would depart dramatically from the established practice of the past 200 years; as the Secretary observed, it would be "a fundamental change in the way we count and locate the persons residing in the United States." Pet. App. 248. *See Franklin v. Massachusetts*, 112 S.Ct. at 2785-86 (Stevens, J., concurring in part and concurring in the judgment)(in reviewing Secretary's decisions, courts may look to "long-held administrative tradition"). Such a "fundamental change"

should be forced upon the country only on a clear showing of its constitutional necessity, but it is precisely here that the Court of Appeals' analysis breaks down.

There is no clear evidence that the adjustment contemplated would improve the accuracy of the census for the only purpose which is constitutionally relevant: ascertaining the *relative* populations of the States so as to reapportion the Congress among them. The constitutional focus, in other words, must be on what the Secretary called "distributive accuracy--that is, getting most nearly correct the proportions of people in different areas," Pet. App. 146-47, rather than "numeric accuracy," or "getting absolute numbers right." Pet. App. 184.[1] That was the Secretary's conclusion, Pet. App. 146-47, 184, and he was certainly correct.

Even at the level of technical statistical analysis, it was far from clear that an adjustment would improve the distributive accuracy of the census. The technical issues involved are, according to the Secretary, "at the forefront of statistical methodology." Pet. App. 144. Expert opinion was divided, Pet. App. 139-40, and the Secretary ultimately concluded that the case for an adjustment had not been made:

> [T]he evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration....Simply correcting for the estimated net undercount can improve numeric accuracy but significantly worsen distributive

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[1]Perhaps counter-intuitively, the two do not go hand in hand. The Secretary's decision includes an illustration of how an adjustment could improve the numeric accuracy of the total population count for the Nation, and for each State within the Nation, while simultaneously *decreasing* its distributive accuracy, thus depriving some States of the representation to which their share of the population would entitle them. Pet. App. 183.

> accuracy. We can see that we missed people in most areas, but we lack a tool which can improve the distribution of population for the purposes of political representation and funding.

Pet. App. 185.

Beyond the technical statistical issues, however, the Secretary was troubled by the implications of an adjustment for future censuses. First, and most troubling, the adjustment process exposes the census to the possibility of political or other manipulation to achieve a preferred result. According to the Secretary, it was impossible to prespecify the adjustment procedure in all respects. Pet. App. 228. As a result,

> in the adjustment procedure an individual or responsible group must make choices which have politically significant effects ... that can be transparent to those making the choices....[S]mall changes in methodology can move seats in the House. It is also true that small changes in the census enumeration can move seats in the House as well, but no individual involved in the enumeration process can predict how.

Ibid; Pet. App. 236-37 ("Decisions that may be nearly equally defensible from a technical standpoint may have very different outcomes which can be known in advance of the decisions.") This fact alone should make anyone think hard, and hesitate long, before imposing such an adjustment on the country. The perception, if not indeed the reality, of such partisan manipulation of the census can only increase popular cynicism toward the representative branches of government, and undermine their legitimacy.

Second, the possibility of post-census adjustments may well undermine the efforts of the Census Bureau to obtain the best possible count during the actual enumeration. *See* Pet. App. 233-35. The Secretary feared that "an adjustment will remove the incentive that [local] officials and groups currently have to provide active support in achieving a complete count," Pet. App. 234, by providing a false sense of security that any shortcomings in the actual enumeration would be made good in the adjustment. An adjustment could thus well set in motion a downward spiral in which deteriorating census counts become the justification for greater and greater "adjustments," which in turn undermine the census still more.

3. The Court of Appeals, however, took quite a different approach to this case. Far from deferring to the Secretary's decision, the Court of Appeals held instead that that decision should be subjected to a form of "*heightened* scrutiny," Pet. App. 34 (emphasis added), which the Court of Appeals derived from this Court's decisions involving state redistricting. The Court of Appeals, looking to such cases as *Wesberry v. Sanders*, *supra*, and *Karcher v. Daggett*, 462 U.S. 725 (1983), Pet. App. 37, said that the Secretary's decision not to adjust the census count was similar to a State's failure to equalize the populations among its legislative districts, and would have to be similarly justified. The Court of Appeals thus held that on remand to the District Court, the Secretary would have to prove that his decision "(a) furthers a governmental objective that is legitimate, and (b) is *essential* for the achievement of that objective." Pet. App. 40 (emphasis added). Pennsylvania submits, however, that this approach is deeply flawed.

In the first place, the underlying standard of the *Wesberry* line of cases--precise mathematical equality among districts--is ill-suited to the problem at hand. Dividing a known population equally among a finite number of districts

is not the same sort of problem as getting the best possible count of that population in the first place. Redistricting decisions are "capable of being reviewed under a relatively rigid mathematical standard," *Department of Commerce v. Montana*, 503 U.S. at 464; but the issue of how best to conduct the census has required the courts to referee arcane disputes among "statisticians, demographers and census officials concerning the desirability of making a statistical adjustment to the census headcount." *Tucker v. Department of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S.Ct. 407 (1992). So foreign is this area to the courts' institutional competence that one court has remarked that "you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness." *Ibid.*

Second, the Court of Appeals' application of *Wesberry* and its progeny to this case rests on that court's assumption that the adjustment contemplated would in fact bring the census closer to the goal of mathematical perfection. *See* Pet. App. 38-39. But this, as we have already demonstrated, is an extremely dubious proposition to which the Secretary does not subscribe, and it is not clear why the Court of Appeals was in a better position than the Secretary to make that judgment.

Third, the logic of the Court of Appeals' decision implies that in the future, the Secretary will be obliged similarly to justify--as *essential* to a legitimate government objective--the failure to take *any* step which, in a reviewing court's opinion, would improve the accuracy of the census. The Secretary's open-ended obligation would be limited only by the ingenuity of special-interest advocates and their experts in devising new ways to gather or manipulate the census data. In the future, then, the States can look forward to at least two, and maybe three, rounds of litigation in each redistricting cycle: first over the districts drawn on the basis of the census numbers as originally reported, then over the legality of the

census itself, and finally over any re-redistricting required by court-ordered revisions in the census results. Litigation of this kind could leave the composition of the Congress and the Electoral College, and redistricting within each State, unsettled well into each decade, with results that can only be called destructive.

CONCLUSION

For these reasons, Pennsylvania asks the Court to reverse the judgment of the Court of Appeals, and to remand the case to that Court with directions to affirm the judgment of the District Court.

Respectfully submitted,

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QUESTION PRESENTED

Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment to the 1990 census violated the Constitution when it was foreseen that a severe differential undercount of Blacks and other minorities would occur.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 94-1614
STATE OF WISCONSIN,
PETITIONER
v.
CITY OF NEW YORK, ET AL.

No. 94-1631
STATE OF OKLAHOMA,
PETITIONER
v.
CITY OF NEW YORK, ET AL.

No. 94-1985
UNITED STATES DEPARTMENT OF COMMERCE,
ET AL, PETITIONERS
v.
CITY OF NEW YORK, ET AL.

ON APPEAL FROM UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE CITY OF DETROIT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The City of Detroit submits this brief in support of the Respondents' position and urges this Court to affirm the decision of the Court of Appeals and remand the case to the district court for further proceedings in light of the Court of Appeals' Opinion.

The City of Detroit seeks to address the well documented and long-standing problem of large numbers of minorities and inner city residents not being counted during the taking of the decennial census. It is the position of the City of Detroit that the manner in which the Census Bureau conducted the 1990 decennial census in the City of Detroit resulted in a serious undercount in that large numbers of persons actually residing in the City of Detroit were not included in the City's or the State's official population count. The Secretary of Commerce's refusal to accept the recommendation of the Director of the Census Bureau that a statistical adjustment was reasonable and necessary was unconstitutional, and as a result, City of Detroit residents' representation and weight of vote in the United States House of Representative and in the Michigan State Legislature were diluted relative to that of other citizens of Michigan and of other states. Due to the racially differential undercount within the State of Michigan, the City of Detroit, which is 76% black and which contains 60% of Michigan's entire black population, was disproportionately undercounted in relation to the majority of other states and all or virtually all of the Michigan's other cities, which are all white or have substantially lower black populations than the City of Detroit. Thus, within the State of Michigan, there was a violation of the constitutional principle of "equal representation for equal numbers of people" in the United States House of Representatives.

The Facts Relating to the Undercounting of the City of Detroit in the 1990 Decennial Census[1]

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[1]The facts relating to the undercounting of the City of Detroit in the 1990 decennial census is set forth fully in the opinion of the Sixth Circuit Court of Appeals, City of Detroit v. Franklin, 4 F.3d 1367, 1369-1372

The official population count of the City of Detroit in the 1990 decennial census was 1,027,974, consisting of 777,916 blacks and 250,058 non-blacks, which gave the City of Detroit a black population of 75.7%. The black population of the State of Michigan was 1,291,706 out of a total population of 9,295,297, giving the State of Michigan a black population of 13.9%. According to the official count, 60% of Michigan's black population reside within the City of Detroit, and the remaining 513,790 black persons reside in significant numbers only in relatively few other cities. In a large majority of Michigan's cities and sub-units, there is little or no black population. City of Detroit demographers have estimated that the population of the City of Detroit as of April 1, 1990, was 1,122,659.

As in past decennial censuses, the 1990 decennial census resulted in a differential racial undercount, with blacks being undercounted disproportionately to whites. According to figures derived from the Post-Enumeration Survey ("PES") that was conducted by the Census Bureau after the census head count, the black undercount rate on the national level was 4.8%, compared to a 1.7% undercount rate for whites. According to the undercount figures for the State of Michigan derived from the PES, Michigan's undercount was 108,706, with an undercount for Detroit of 37,026, or approximately 34% of the total. Thus, with respect to the PES figures, it is not disputed that the City of Detroit, with its large black population, was disproportionately undercounted in relation to all or virtually all other states and all of Michigan's other cities and sub-units, which are all-white or have substantially lower black populations than the City of Detroit. When the official population count of the census was used to reapportion

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(6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1217 (1994).

Michigan's congressional representation, it followed that the residents of the City of Detroit, which was disproportionately undercounted in relation to all or virtually all of Michigan's other cities and sub-units and other states, received proportionately less congressional representation in the United States House of Representatives and Michigan Legislature than was received by the residents of other states and of the other cities and sub-units in the State of Michigan.[2]

Congress has established numerous programs of grants-in-aid to cities and other sub-units that are based on the population of the cities and sub-units, as contained in the official population count prepared and certified by the Census Bureau in connection with the decennial census and/or the mid-year census authorized under 13 U.S.C. § 141(d)(e). Such programs, under which the City of Detroit

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[2] To illustrate, since Michigan, with an officially reported population count of 9,295,297, is entitled to 16 seats in the House of Representatives, each Congressional district within the State of Michigan should have approximately 580,956 persons. The officially reported population count of the City of Detroit is 1,207,974, so that, as reported, the City of Detroit would embrace 1.769 Congressional districts. If an adjustment for the racially differential undercount had been made in accordance with the figures derived from the Post-Enumeration Survey, Michigan's total population would be approximately 9,404,000, so that each Congressional district would contain approximately 587,750 persons. With an adjusted popuiation count of 1,065,000 according to the Post-Enumeration Survey, instead of an official population count of 1,027,974, the City of Detroit would embrace 1.811 Congressional districts instead of 1.769. Thus, the use of the unadjusted officiai population count to determine Congressional representation within the State of Michigan means that residents of the City of Detroit have proportionately less representation in the House of Representatives than the residents of all or virtually all of the other cities and sub-units in Michigan.

receives substantial amounts of federal funds, include Community Development Block Grants, Rental Housing Rehabilitation, Emergency Shelter Grants, and Urban Mass Transit Capital and Operating Assistance. Because the population of the City of Detroit, as reported by the Census Bureau in the official population count of the 1990 decennial census, was substantially less than the City's actual population, and substantially less than what its population would have been if an adjustment had been made for the racially differential undercount nationwide and/or within the State of Michigan, the City of Detroit received substantially less amounts of federal funds under these programs than it otherwise would have been entitled to receive.

The City of Detroit filed suit in the Eastern District of Michigan on July 25, 1991, with federal jurisdiction premised on 28 U.S.C. § 1331, alleging two counts of constitutional violation. The plaintiffs sought to compel an adjustment or revision of the census for Michigan alone. City of Detroit v. Franklin, 4 F.3d 1367, 1377 (6th Cir. 1993), cert. denied, ___ US ___, 114 S.Ct. 1217 (1994). Count I, the undercount claim, alleged that the manner in which the Census Bureau conducted the 1990 decennial census in the City of Detroit resulted in a serious undercount in that large numbers of persons actually residing in the City of Detroit were not tabulated and so were not included in the City's official population count. The undercount claim related to the way the Census Bureau conducted the census in Detroit. The facts relating to the way in which the census was conducted in Detroit are set out fully in the opinion of the Sixth Circuit Court of Appeals, City of Detroit v. Franklin, supra, at 1369-1372. Count II, the statistical claim, alleged that as a result of the failure to make a statistical adjustment, plaintiff Young's (then Mayor Coleman A. Young) and other residents of the City of

Detroit representation and weight of vote in the United States House of Representatives were diluted relative to that of other citizens of Michigan and other states when the official population count of the cities and sub-units of the State of Michigan, as reported and certified by the Census Bureau, was used in the reapportionment of Michigan's congressional representation following the 1990 decennial census.

The basis of the plaintiffs' statistical adjustment claim was that because of the concentration of Michigan's black population within the City of Detroit and a few other areas in Michigan, a statistical adjustment for the racially differential undercount within the State of Michigan, under any method of adjustment, would produce an official population count for the cities and sub-units of the State of Michigan that, on balance, would be more accurate, or "closer to the truth," than an official population count based on the raw unadjusted data alone. The refusal to make a statistical adjustment was unconstitutional. The "PES" data indicated that the undercount for the City of Detroit was 37,026 out of Michigan's total undercount of 108,708. The failure to adjust the undercount for City of Detroit residents and other minorities who live in urban areas with high black populations, deprived minorities of their right of equal representation in the United States House of Representatives, and in the State Legislature of Michigan, and the lost of substantial sums of funds. Thus, the refusal of the Secretary of Commerce to adjust the census severely affected the City of Detroit on the national and state levels.

The district court granted the defendant Secretary of Commerce motion for summary judgment on both counts of the complaint on the ground that the plaintiffs "failed to state a violation of any judicially enforceable constitutional right." City of Detroit v. Franklin, 800 F.Supp. 539, 540 (E.D.

Mich. 1992). The Sixth Circuit Court of Appeals in City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993), affirmed the district court's grant of summary judgment. The Sixth Circuit, relying on Tucker v. United States Department of Commerce, 958 F.2d 1411 (7th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 407 (1992), stated that a "claim to a census adjustment invokes no judicially administrable standards." Id. at 1418.

STATEMENT OF THE CASE

Amicus adopts the statement of the case as presented by Respondent City of New York, but wishes to emphasize those facts surrounding the undercounting which are peculiar to the City of Detroit as stated in the Statement of the Amicus Curiae Interest and as stated in the City of Detroit v. Franklin, 4 F.3d 1367, 1369-1372 (6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1217 (1994).

SUMMARY OF ARGUMENT

The Apportionment Clause, Article I, Section 2, Clause 3 (Art.I, §2, cl.3) requires that the Census Bureau make a tabulation of the population of each state and of each city and sub-unit within a state that as accurately as possible includes all person reasonably capable of being determined to reside within each state and within each city and sub-unit within a state. This constitutional obligation is breached if the census is conducted in a particular locale, such as the City of Detroit, in such a manner that substantial numbers of persons are in fact missed or undercounted, so that the official population count for that place as reported by the Bureau is substantially less than its actual population and results in a serious undercount of minorities. A breach also

occurs if the Secretary of Commerce fails to use proven statistical techniques to adjust the official population count among the states and of the cities and sub-units within a state for the admittedly racially differential undercount, when the Census Bureau has declared that these techniques would increase the accuracy of the census and correct the undercount of minorities. Where an official population count as adjusted would more accurately report the actual population of a state and of the cities and sub-units within the state, than an official population count based on the raw unadjusted census data alone, which predictably results in a differential undercount of members of minority groups, the constitution has been violated.

The constitutional basis for the decennial census relates entirely to the apportionment of representation in the United States House of Representatives among and within the several states and to the representation of persons within that body in accordance with the principle of equal representation for equal numbers of people. In regards to the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives, the differential undercounting of minorities is a serious problem, because it is not randomly distributed. The racially differential undercount for blacks in the 1990 Census was about three times that for non-blacks. This means that cities like the City of Detroit, with its 75.6% black population, are disproportionately undercounted in relation to virtually all other states and all of Michigan's other cities which have substantially lower black populations than the City of Detroit. Thus, the State of Michigan, on the national level, and City of Detroit residents received proportionately less congressional representation in the United States House of Representatives than was received by other cities in other states and other cities in the State of Michigan.

Accordingly, within the State of Michigan, and among other states similarly situated, there has in fact been a violation of the constitutional principle of equal representation.

A loss of representation raises a concern of constitutional dimension, and challenges to apportionment are fully justiciable. The constitutional obligation of the Census Bureau to conduct the most accurate census that it is reasonably possible to conduct, relates to and is derived from the constitutional function of the decennial census: "to enumerate the whole number of persons in each State" for the purpose of apportionment of representation in the House of Representatives." First, Art. I, § 2, cl.3, requires that the apportionment of Congressional representation among the several states and within each state take place strictly in accordance with the principle of equal representation for equal numbers of people. Second, the official population count of the several states and of the cities and sub-units within each state, as tabulated and certified by the Census Bureau, is the constitutional basis for the apportionment of Congressional representation among the several states, and is in fact the only constitutionally permissible basis for the apportionment of Congressional representation within each state. This being so, the official population count of all of the several states and of each city and sub-unit within a state must be as accurate as is reasonably possible and must not disproportionately fail to include persons living in a particular state or states in relation to persons living in other states or persons living in a particular city or sub-unit within a state in relation to persons living in other cities or sub-units in the state.

Minority residents of the disproportionately undercounted states or the cities and sub-units within a state will in actuality have less representation in the House of

Representatives than the residents of the other states and the residents of the cities and sub-units within a state for whom the official population count more accurately reports their actual population. Since the right to vote in a free and unimpaired manner is preservative of other basis civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

The principle of equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality or for which justification is shown. The effect of the racial differential undercount, which was left uncorrected, was to create a deviation from an accurate census, far more than is constitutionally tolerable.

Clearly, the differential undercounting of minorities was not unavoidable. The Court of Appeals found to the contrary as the Secretary of Commerce conceded that "PES adjusted estimates reflect more accurately the total population and the ethnic population of the country." The record clearly established in the instant case that no legally acceptable justification for tolerating the differential undercount existed.

Art. I, § 2, cl. 3 of the United States Constitution requires that the official decennial population count reflect as accurately as is reasonably possible, the true population of the state, cities, and other governmental sub-units within each state. The official population count using only raw unadjusted census data, does not accurately reflect the actual population of the states, and governmental units within the states. Raw unadjusted census data dilutes the weight of a

citizen's vote and strikes at the heart of representative government. The failure to adjust the data of the decennial census for a known undercount of minorities violates the Constitution and Article I, § 2, cl. 3, which guarantees that all people will have their vote counted equally with other persons.

Because of the nature of the right, the Court of Appeals correctly applied heightened judicial scrutiny of the Secretary's decision. The Court of Appeals properly disapproved of the district court's extreme deference. Following the Supreme Court's teachings and analysis therein in a line of authority of caselaw that runs from Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), through Karcher v. Daggett, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), the Court of Appeals observed that the requirement of a "good-faith effort" to achieve equality, is imposed on federal, as well as state, actors, where allocation of political representation is at issue. Therefore, the Court of Appeals was correct in ruling that the United States government must explain what legitimate governmental objective it relies upon to support its decision to refuse to adjust the census.

ARGUMENT

I. THE SECRETARY'S DECISION NOT TO UNDERTAKE A STATISTICAL ADJUSTMENT OF THE 1990 CENSUS WAS INCONSISTENT WITH THE CONSTITUTION AS THE APPORTIONMENT CLAUSE IMPOSES A JUDICIALLY COGNIZABLE OBLIGATION ON THE CENSUS BUREAU TO SUBMIT AN OFFICIAL

POPULATION COUNT FOR EACH STATE AMONG THE STATES AND FOR THE CITIES AND SUB-UNITS WITHIN EACH STATE THAT AS ACCURATELY AS POSSIBLE INCLUDES ALL PERSONS REASONABLY CAPABLE OF BEING DETERMINED TO RESIDE WITHIN EACH STATE AND WITHIN EACH CITY AND SUB-UNIT OF A STATE.

The heart of this case involves the constitutional guarantee of equal representation - an equal number of votes for an equal number of people. The issue is whether Plaintiffs-Respondents' constitutional rights were violated by the Secretary of Commerce refusal to adjust the census when it was undisputed that the Post Enumeration Survey (PES) resulted in a more accurate count than the original census and would have substantially lessened the minority differential undercount. City of New York v. Department of Commerce, 34 F.3d 1114, 1122-23 (2nd Cir. 1994). The Secretary's refusal to use the more accurate data was inconsistent with the constitutional goal of equal representation.

The Apportionment Clause, Art.I., § 2, cl.3,[3]

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[3] The apportionment clause of the original constitution reads as follows:

> Representatives ... shall be apportioned among the several States ... according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons ... and excluding Indians not taxes, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years,

requires that the Census Bureau make a tabulation of the population of each state and of each city and sub-unit within a state that as accurately as possible includes all person reasonably capable of being determined to reside within each state and within each city and sub-unit within a state. This constitutional obligation is breached if the census is conducted in a particular locale, such as the City of Detroit, in such a manner that substantial numbers of persons are in fact missed, so that the official population count for that place as reported by the Bureau is substantially less than its actual population and results in a serious undercount of minorities. A breach also occurs if the Secretary of Commerce fails to use proven statistical techniques to adjust the official population count among the states and of the cities and sub-units within the state for the admittedly racial differential undercount, which the Census Bureau declared would increase the accuracy of the census and correct the disproportionate undercount of minorities. City of New York v. United States Department of Commerce, 34 F.3d 1114, 1122-23 (2nd Cir. 1994). Where an official population count as adjusted would more accurately report the actual population of a state and of the cities and sub-units within the state than an official population count based on the raw unadjusted census data alone, which predictably results in a differential undercount of members of minority groups, the constitution has been violated. The Secretary of Commerce acknowledged a differential undercount would occur in the unadjusted census. The Secretary conceded that the PES

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in such Manner as they shall by Law direct.

The fourteenth amendment later changed the first sentence of the apportionment clause to read as follows:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

was of high quality and detected an overall undercount in the census and a differential undercount in the national level by race and ethnic origin. Id. An adjustment would have dramatically increased the accuracy of the census.

The constitutional basis for the decennial census relates entirely to the apportionment of representation in the United States House of Representatives among and within the several states and to the representation of persons within that body in accordance with the principle of equal representation for equal numbers of people. Art.I, § 2, cl.3, as amended by amend. XIV, § 2, provides first, that Representatives shall be apportioned among the several states "according to their respective numbers, counting the whole number of persons in each State," and goes on to provide for the taking of the decennial census in order that the "whole number of persons in each State" may be officially tabulated and certified by the United States government.

In regards to the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives, the differential undercounting of minorities is a serious problem, because it is not randomly distributed. The racially differential undercount for blacks in the 1990 Census was about three times that for non-blacks. This means that cities like the City of Detroit, with its 75.6% black population, are disproportionately undercounted in relation to virtually all other states and all of Michigan's other cities having substantially lower black populations than the City of Detroit. Thus, the State of Michigan, on the national level, and the City of Detroit residents received proportionately less congressional representation in the United States House of Representatives than was received by other cities in other states and other cities in the State of Michigan.

Accordingly, within the State of Michigan and among other states, there has in fact been a violation of the constitutional principle of equal representation.

A loss of representation due to census inaccuracy raises a concern of constitutional dimension. In Carey v. Klutznick, 637 F.2d 834 (2d Cir. 1980), the City of New York and New York State challenged the manner in which the Census Bureau conducted the 1980 census. The plaintiffs in that case based their claim on the Apportionment Clause and alleged that the census was conducted in such a manner that would inevitably result in an undercount, which would not be evenly distributed across the state, but would instead occur at a higher rate in low-income areas populated largely by members of minority groups. Similar to the arguments raised by the City of Detroit in City of Detroit v. Franklin, 800 F.Supp. 539 (E.D. Mich. 1992), the gravamen of their claim rested on the inaccuracy of the Address Control File prepared for New York City. Id. at 836.

The defendants in Carey v. Klutznick argued that the allegations as to the mismanagement of the census alleged in the complaint failed to state a justiciable claim under the Apportionment Clause. The Second Circuit emphatically rejected this contention. It noted that if the procedures used to conduct the census resulted in a disproportionate undercount in New York City, this could deprive the state and the city of the congressional representation to which they were entitled under the Constitution. Since this result would be inconsistent with the constitutional requirement of "equal representation for equal numbers of people" in the United States House of Representatives, Wesberry v. Sanders, 376 U.S. 1, 7-8, 84 S.Ct. 526; 11 L.Ed 2d 481 (1964), the Second Circuit Court of Appeals concluded that the plaintiffs had stated a justiciable claim under the Apportionment

Clause. Carey v. Klutznick, supra at 839. Stated simply, the Second Circuit held that the claim was justiciable, because the Apportionment Clause requires that Congress be fairly apportioned on the basis of accurate census figures. Id. As a result of the Second Circuit's decision in Carey v. Klutznick, the challenge of New York City and New York State to the accuracy of the official count of their populations in the 1980 decennial census was determined on the merits. Cuomo v. Baldridge, 674 F.Supp. 1089 (S.D.N.Y. 1987).

The Secretary's decision not to adjust the enumeration results in an undercount, and a loss of political representation arises under Article I, § 2."[4] The loss of representation violates the Constitution's goal of equal representation for equal numbers of people. As the Court observed in Carey v. Klutznick, 637 F.2d 834, 839 (2d Cir. 1980):

> [T]he Supreme Court has held that Article I, § 2 of the Constitution means that "as nearly as is practicable one man's vote in a

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[4] In an adjustment for the racially differential undercount had been made in accordance with the figures derived from the Post-Enumeration Survey, the City of Detroit would embrace 1.811 Congressional districts instead of 1.769, thereby increasing the plaintiff Young's weight of representation and weight of vote in the United States House of Representatives. This weight of representation and weight of vote would be increased still further if the population of the City of Detroit were increased to include the persons missed in the taking of the decennial census, as per the plaintiffs' undercount claim. The federal court would be constitutionally required to reopen the case and order a new apportionment because the census data on which the original apportionment was made was no longer valid, and so could not constitutionally be used as the basis for an apportionment of Congressional representation.

> congressional election is to be worth as much as another's," Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964), and that "our Constitution's plain objective [is to make] equal representation for equal numbers of people the fundamental goal," Id. at 18. See also Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

Based on those principles, the Carey court recognized that a claim that census inaccuracy would result in a loss of congressional representation arises under Article I, § 2, cl.3, of the Constitution and that constitutional challenges to apportionment are fully justiciable. Franklin v. Massachusetts, 505 U.S. 788, 112 S.Ct. 2767, 2777, 120 L.Ed 2d 636 (1992); United States Department of Commerce v. Montana, 503 U.S. 788, 112 S.Ct. 1415, 1426-27, 118 L.Ed.2d 87 (1992). Thus, the apportionment clause does not represent a textually demonstrable constitutional commitment to the political branches (Congress or the President) of constitutional questions relating to the decennial census or the use of census data for the apportionment of congressional representation. United States Department of Commerce v. Montana. Accordingly, the apportionment clause can be the source of judicially cognizable obligations imposed on the Census Bureau with respect to the conduct of the census, and the determination of the official population count among the states and of the cities and sub-units within a state.

In the very recent case of United States Department of Commerce v. Montana, supra, 112 S.Ct. 1415 (1992), the State of Montana challenged the constitutionality under the Apportionment Clause of Congress' use of the "equal proportions" method to allocate seats in the United States

House of Representatives between the states, contending that Congress was constitutionally required to use the "method of harmonic mean" instead. The Government argued that "Congress' selection of any of the alternative apportionment methods involved in this litigation is not subject to judicial review," and that, "the choice among these methods presents a 'political question' not amenable to judicial resolution." Id. at 112, S.Ct. at 1424.

In rejecting this contention, the Supreme Court emphasized that the Government was confusing the justiciability of the issue of whether the Constitution required Congress to select a particular method of apportionment with the substantive constitutional question of whether the method chosen by Congress violated the Constitution. Id., 112 S.Ct. at 1425. That substantive constitutional question was fully justiciable by the courts, since as the Court stated: "The controversy between Montana and the government turns on the proper interpretation of the relevant constitutional provisions. As our previous rejection of the political question doctrine in this context should make clear, the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary." Id., 112 S.Ct. at 1425-6 (emphasis added).

The principle of equal representation for equal numbers of people in the United States House of Representatives applies not only to the apportionment of representation among the several states, but also to the apportionment of Congressional representation within each state, and drawing lines for the allocation of congressional and legislative seats within states. In Wesberry v. Sanders, 376 U.S. 1, 8, 84 S.Ct. 526, 530, 11 L.Ed.2d 481 (1964), the Supreme Court held that Art. I, § 2, cl.3, requires "as nearly as is practicable, one man's vote in a congressional

election to be worth as much as another's." Furthermore, the apportionment clause controls the apportionment of Congressional representation within each state, as well as among the several states, and requires that Congressional apportionment within each state take place strictly in accordance with the principle of equal representation for equal numbers of people. Subsequent decisions of the Court have made it clear that the apportionment of Congressional representation within a state must follow the principle of equality. A state must make a good-faith effort to achieve precise mathematical equality, and the state has the burden of justifying each variance from that standard, no matter how small. Karcher v. Daggett, 462 U.S. 725, 730-31, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983); Kirkpatrick v. Preisler, 394 U.S. 526, 530-31, 89 S.Ct. 1225, 22 L.Ed. 2d 519 (1969).

The holding in Wesberry and the cases following also make it clear that the constitutional function of the decennial census, to ensuring that the House of Representatives should represent "persons according to their respective numbers," includes the determination of the population of the cities and sub-units within each state, so that Congressional districts within each state can be drawn in accordance with the principle of "equal representation for equal numbers of people." And as the Court noted in Kirkpatrick, supra at 531: "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."

The constitutional obligation of the Census Bureau to conduct the most accurate census that it is reasonably possible to conduct, relates to and is derived from the constitutional function of the decennial census: "to enumerate the whole number of persons in each State" for the purpose

of apportionment of representation in the House of Representatives." First, Art. I, § 2, cl.3, requires that the apportionment of Congressional representation among the several states and within each state take place strictly in accordance with the principle of equal representation for equal numbers of people. Second, the official population count of the several states and of the cities and sub-units within each state, as tabulated and certified by the Census Bureau, is the constitutional basis for the apportionment of Congressional representation among the several states, and is in fact the only constitutionally permissible basis for the apportionment of Congressional representation within each state. This being so, the official population count of all of the several states and of each city and sub-unit within a state must be as accurate as is reasonably possible and must not disproportionately fail to include minority persons living in a particular state or states in relation to persons living in other states or minority persons living in a particular city or sub-unit within a state in relation to persons living in other cities or sub-units in the state.

A disproportionate undercount of the residents of a particular state or the residents of a particular city or sub-unit within a state will lead to a constitutional distortion. If the official population count of a state or of a city or sub-unit within a state, as reported and certified by the Census Bureau, does not as accurately as is reasonably possible report the number of persons residing in that state in relation to the actual number of persons residing in other states, or the actual number of persons residing in a city or sub-unit within a state in relation to the actual number of persons residing in other cities and sub-units within the state, when the official population count is used in Congressional reapportionment following the decennial census, the reapportionment will not in fact take place in accordance

with the principle of "equal representation for equal numbers of people." Residents of the disproportionately undercounted states or the cities and sub-units within a state will in actuality have less representation in the House of Representatives than the residents of the other states and the residents of the cities and sub-units within a state for whom the official population count more accurately reports their actual population. The purpose of redistricting is to ensure residents enjoy equal representation in their legislatures. Kirkpatrick v. Preisler, supra, 394 U.S. at 530. The constitutional function of the decennial census, therefore, will have been subverted, because as among the several states, and within each state, there will not in fact be "equal representation for equal numbers of people" in the United States House of Representatives.

The Supreme Court in Wesberry v. Sanders, supra, 376 U.S. at 18, held that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

As the Supreme Court in Reynolds has explained:

> [T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.

Reynolds v. Sims, 377 U.S. at 560-61. In accordance with these principles, this Court has recognized that a dilution of the votes of state residents, "particularly members of minority groups - vis-a-vis those of other residents of the state with respect to the state legislature", that results from census inaccuracy, impairs rights secured by the Constitution. Carey v. Klutznick, 637 F.2d at 836.

As a result, of both the undercount within the City of Detroit and the failure of the Secretary of Commerce to adjust for the racially differential undercount, there has been an extreme disproportionate undercount of minorities of the City of Detroit in relation to most of the other cities and sub-units within the State of Michigan. It follows, therefore, that when the Congressional redistricting of Michigan was carried out in accordance with the official population count of the cities and sub-units of the State of Michigan, as reported and certified by the Census Bureau, the resulting Congressional apportionment did not in fact satisfy the constitutional requirement of equal representation for equal numbers of people in the United States House of Representatives. Residents of the City of Detroit do not in fact have equal representation for equal numbers of people in the United States House of Representatives, and residents of most of Michigan's other cities and sub-units have greater representation in the House than that to which they are constitutionally entitled.

Furthermore, the concentration of the undercount among minority populations in the 1990 census means that when the unadjusted census is used for redistricting, the goal of producing districts containing the same number of residents cannot be met. Districts with more minority residents than the average for other districts with which they are being compared for redistricting purposes will therefore

have larger populations than the average district, diluting the votes of residents of the high -minority districts such as the City of Detroit. The effect of the undercount left uncorrected was to create a deviation from an accurate census, far more than is constitutionally tolerable. See Karcher v. Daggett, supra, 462 U.S. at 731-34. Minorities and those who live in communities where they are concentrated bear the burden of that deviation from equality of population in the dilution of their votes.

The principle of equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality or for which justification is shown. Kirkpatrick v. Preisler, supra, 22 L.Ed.2d 519, 524. Clearly, the racial differential undercount among minorities was not unavoidable. The Court of Appeals found to the contrary, as the Secretary of Commerce conceded that "PES adjusted estimates reflect more accurately the total population and the ethnic population of the country." City of New York v. U.S. Department of Commerce, supra, 34 F.3d at 1122-1123.

The record clearly established in the instant case that no legally acceptable justification for tolerating the differential undercount existed, City of New York v. U.S. Department of Commerce, supra, 34 F.3d at 1130-1131. The differential undercounting of minorities is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people. In Reynolds v. Sims, the Supreme Court enunciated that:

> "Neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities

> from population based representation. Citizens, not history or economic interests, cast votes." Reynolds v. Sims, supra, 377 U.S. at 579-580, 12 L.Ed.2d at 537-538.

Thus, the Secretary of Commerce's concern with upholding "a two-hundred year tradition of how we actually count people", City of New York v. U.S. Dept of Commerce, supra at 1122, cannot withstand constitutional muster.

Art. I, § 2, cl. 3 of the United States Constitution requires that the official decennial population count reflect as accurately as is reasonably possible, the true population of the state, cities, and other governmental sub-units within each state. The official population count using only raw unadjusted census data, does not accurately reflect the actual population of the states, and governmental units within the states. Raw unadjusted census data dilutes the weight of a citizen's vote and strikes at the heart of representative government. See Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964). The failure to adjust the data of the decennial census for a known undercount of minorities violates Art. I, § 2, cl. 3, which guarantees that all people will have their vote counted equally with other persons. The debates at the Convention indicated that the founders of the Constitution wanted to ensure fair representation. Nothing in Art. I, § 2, cl. 3 prohibits an accurate statistical adjustment of the decennial census to obtain an accurate count. Quite to the contrary, Article I of the Constitution, which mandates equal apportionment of representatives, also mandates an adjustment to obtain a more accurate census of the actual population. When the allocation of federal resources and the apportionment of congressional representatives rest on an accurate census, it is unconstitutional for the Secretary of

Commerce to refuse to adjust the census data, when he knew that an undercount which heavily disfavored blacks and other minorities occurred, and there is a proven statistical method in existence to correct the undercount.

Because of the nature of the right, the Court of Appeals correctly applied heightened judicial scrutiny of the Secretary's decision. The Secretary's decision placed other incidental factors above lessening the disproportionate undercounting of minorities. City of New York v. Department of Commerce, supra, 34 F.3d. at 1130-1131. The critical paragraph in the Court of Appeals' decision, in which the court explained the basis for its conclusion that the Secretary's judgment was not made in good faith, is as follows:

> In the present case, the findings of the district court . . . plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable. Those findings are supported by, inter alia, the Secretary's acknowledgement that the PES-indicated adjustments would likely not only make the census more accurate nationally, but would also reduce the disparate impact of the census' inaccuracies on minority groups, and that he gave other factors priority over achievement of greater accuracy. For example, he stated that he valued "distributive accuracy" over numerical accuracy; and in stating that an adjustment would not be made because it would not result in greater distributive accuracy, the Secretary revealed

> that he would decline to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate. Id.

The Secretary conceded that the "PES-adjusted estimates reflect more accurately the total population and the racial and ethnic populations of the country." City of New York v. Department of Commerce, supra, 34 F.3d at 1122, 1130. With that concession, the Secretary also conceded that an adjustment would improve the distributive accuracy of the census. Id. "The impact of the differential undercount was naturally more severe in those areas in which racial and ethnic minorities were more concentrated." Id. at 1131.

The Court of Appeals properly disapproved the district court's extreme deference. Following this Court's teachings and analysis therein in the line of case law authority that runs from Wesberry v. Sanders, 376 U.S. 1 (1964), through Karcher v. Daggett, 462 U.S. 725 (1983), the Court of Appeals observed that the requirement of a "good-faith effort" to achieve voter equality, where allocation of political representation is at issue, is imposed on federal, as well as state, actors. Montana, supra, 503 U.S. at 460-464; City of New York v. Department of Commerce, supra, 34 F.3d at 1129, 1131. The Court of Appeals recognized that constitutional constraints on the apportionment of the House of Representatives mean that "the goal of precise equality in voting power is 'illusory for the Nation as a whole,'" (quoting Montana, 503 U.S. at 463), but concluded that "[t]he impossibility of achieving precise mathematical equality is no excuse for not making

this mandated good-faith effort." City of New York v. Department of Commerce, supra, 34 F.3d at 1129.

A long line of cases rooted in the Constitution and its history has established that the right to vote is one crucial to the presentation of our democratic society and that such right cannot be abrogated. In Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1963), the Supreme Court stated:

> "The right to vote freely for the candidate of one's choice is the essence of a democratically society and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Because the right to vote involves a fundamental right, coupled with the fact that the severe undercounting of minority and ethnic groups diluted the minority vote, the court correctly held that a heightened degree of scrutiny should occur. City of New York, supra, at 1128. The right to have one vote's count equally is fundamental and constitutionally protected. The Equal Protection Clause guarantees the opportunity for equal participation by all voters. Dilution of the weight of a vote because of race or place of residence impairs basic constitutional rights. Reynolds v. Sims, supra, 377 U.S. at 566, 84 S.Ct. 1384, 12 L.Ed.2d 529-530.

Applying the analytic framework of Karcher, supra, 462 U.S. at 730-731, the Court of Appeals accepted the

district court's finding that the adjusted counts had been shown to be more accurate, and proceeded to the question of whether Plaintiffs had carried their burden of showing the decision to use less accurate data "was not the product of a good-faith effort to achieve equality." In considerable detail, the Court of Appeals spelled out the basis for its determination that Plaintiffs had carried that burden. City of New York v. U.S. Department of Commerce, supra, 34 F.3d at 1130-1131. The Court of Appeals correctly held that in cases involving apportionment, a plaintiff is required to show only "that the governmental entity failed to make a good-faith effort to achieve equal districts as nearly as practicable." Plaintiff need not show that the government's discrimination was not intentional. Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed 2d 597 (1976).

The Supreme Court in Karcher v. Daggett, supra, 462 U.S. 725 (1983), made it clear in that case that the official population count of the cities and sub-units of the state, as reported and certified by the Census Bureau, was the only reliable indicator of the actual population of the cities and sub-units of the state, and so could be the only basis for Congressional apportionment within the state. As the Supreme Court stated: "[b]ecause the census count represents the 'best population data available,' it is the only basis for good-faith efforts to achieve population equality." 462 U.S. at 738. As the Court also noted, "Adopting any standard other than population equality, using the best census data available, would subtly erode the Constitution's ideal of equal representation." Id. at 731.

The right to protection from an individual vote being diluted, flows from "the fundamental principle in this country that the democratic system mandates equal representation for equal numbers of people without regard to

race, sex, economic status or place of residence within a state and among the states." Reynolds v. Sims, 377 U.S. 533, 560-61, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); Wesberry v. Sanders, 376 U.S. 1, 17-18, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). The whole thrust of the "as nearly as practicable" approach is inconsistent with the adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. Since equal representation for equal numbers of people is the fundamental goal for the House of Representatives", Wesberry v. Sanders, supra, 376 U.S. at 18, 84 S.Ct. at 535, the "as nearly as practicable" standard requires the federal government and the state to make a good faith effort to achieve equality. See Karcher v. Daggett; Reynolds v. Sims, 377 U.S. 533, 577, 84 S.Ct. 1362, 1389, 12 L.Ed.2d 506 (1964).

Accordingly, unless a legitimate governmental objective exists for the racially differential undercount, this Court cannot tolerate or uphold the Secretary's decision to refuse to adjust the census data. The differential undercounting of minorities may be expected to continue in future censuses, and so will again result in the subversion of the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives if the matter is not resolved, and the Secretary of Commerce is not required to prove a legitimate governmental objective exists for refusal to adjust the census.

CONCLUSION

For the reasons stated herein, the Court of Appeals' opinion should be affirmed and the case remanded to the district court for the Secretary of Commerce to explain what

legitimate governmental objective exists to support his reliance upon the unadjusted census data and his refusal to adjust the census.

Respectfully submitted,

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Date: December 8, 1995

Supreme Court, U.S.
FILED
DEC 8 1995
CLERK

Nos. 94-1614, 94-1631 and 94-1985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN,

Petitioner,

vs.

CITY OF NEW YORK, *et al.*,

Respondents.

(For Continuation of Caption See Reverse Side of Cover)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE NEW YORK CIVIL LIBERTIES UNION and THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF RESPONDENTS

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(For Further Appearances See Reverse Side of Cover)

STATE OF OKLAHOMA,

Petitioner,

vs.

CITY OF NEW YORK, *et al.*,

Respondents.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Petitioners,

vs.

CITY OF NEW YORK, *et al.*,

Respondents.

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INTEREST OF AMICI[1]

Lawyers' Committee for Civil Rights Under Law

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Lawyers' Committee. The Lawyers' Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 30 years, including cases before this Court, *see, e.g., Clark v. Roemer,* 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986) and *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

American Civil Liberties Union and New York Civil Liberties Union

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The New York Civil Liberties Union is its statewide affiliate. Since its founding in 1920, the ACLU has sought to ensure that people whose constitutional or statutory rights have been denied by the government or by government officials have an effective means of redress. The ACLU has participated directly or as *amicus curiae* in many of the cases in this Court concerning voting and/or equal rights.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

American Jewish Committee

The American Jewish Committee (AJC) is a national organization that was founded in 1906 to protect the civil and religious rights of Jews. AJC has always believed that these rights can be secure for Jews only when the rights of Americans of all faiths, races and ethnic backgrounds are equally secure. That is why AJC strongly believes that the census undercount must be corrected. Unless it is corrected, the constitutional rights of those not counted, disproportionately black and Hispanic residents of large cities, remain violated. Correcting the undercount is necessary to cure this egregious violation.

NAACP Legal Defense and Educational Fund, Inc.

The NAACP Legal Defense and Educational Fund, Inc. is a nonprofit organization under § 501(c)(3) of the Internal Revenue Code, which exists to provide free legal representation to African Americans and others who are subject to discrimination in violation of the United States Constitution and other laws. Since its establishment in 1940, it has developed a reputation for expertise in civil rights litigation through the many cases in which it has provided representation, including *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (school desegregation); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (voting rights); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (school desegregation); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employment discrimination); *White v. Regester*, 422 U.S. 935 (1975) (voting rights); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (voting rights); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (voting rights). *See also NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing Legal Defense Fund as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

Puerto Rican Legal Defense and Education Fund, Inc.

Since its inception in 1972, the Puerto Rican Legal Defense & Education Fund, Inc. (PRLDEF) has worked to politically empower the Puerto Rican and Hispanic community. PRLDEF has represented Latinos in many cases protecting and furthering their voting rights. The issues presented in this appeal concerning the census undercount are central to protecting the constitutional and statutory rights of the Latino community. The underrepresentation of Latinos in Congress will never be fully addressed until the undercount of Latinos by the census is remedied.

STATEMENT OF CASE

Since its inception, the decennial census has historically undercounted the number of people in the United States. It has also historically undercounted racial and ethnic minorities at a greater rate than non-minorities. For at least the last five censuses, the historic undercount of minorities has been well documented and has continued, largely unchanged, decade after decade. Currently, certain minorities—specifically, African-Americans, Hispanics and American-Indians—are being undercounted at a rate twice that of whites. The protracted and sophisticated efforts of the Census Bureau and this litigation were undertaken in an effort to prevent another undercount in the 1990 census, or, if prevention was impossible, to ensure that a reliable method was developed and utilized to correct that undercount.

By the spring of 1987, the Bureau of the Census developed a method by which the decennial census could be adjusted to correct the undercount. The parties agree that the method, known as the Post-Enumeration Survey, or PES method, increases the numerical accuracy of the census and alleviates the undercounting of minorities. The disputed question is whether the PES method is at least as distributively accurate as the unadjusted census. The Director of the Census Bureau, the agency that conducts the decennial census, recommended to the Secretary of Commerce that, because of

the adjusted census' increased accuracy, the adjustment method in calculating the 1990 census should be used. She was joined in this recommendation by a majority of the Undercount Steering Committee and other experts.

Notwithstanding the recommendation of the Census Bureau, the then-Secretary of Commerce, Robert Mosbacher, refused to adjust the census. He based his decision on a series of conclusions. He conceded that the adjustment would improve numerical accuracy and reverse the historically skewed undercount of racial and ethnic minorities. He questioned the improvements that would be achieved in distributive accuracy by adjustment. His final conclusion was that the proponents of adjustment—the vast majority of the Census Bureau experts—had not met their burden of proving the superiority of the adjustment. Thus, the 1990 census as presented to the President failed to account for more than 5 million persons, including 5% of the country's African-Americans, Hispanics and American-Indians. The District Court, applying a deferential standard, did not explicitly state which method would be most accurate, but implied that it agreed with the Census Bureau experts and stated that if called upon to review the issue *de novo* would order adjustment. *City of New York v. U.S. Dept. of Commerce*, 822 F. Supp. 906, 928 (E.D.N.Y. 1993). The Court of Appeals concluded that the record showed that the adjusted census would improve numerical accuracy, cure the undercount, and would not, at least, hinder distributive accuracy. *City of New York v. U.S. Dept. of Commerce*, 34 F.3d 1114, 1130-31 (2d Cir. 1994). Accordingly, it remanded the case to the District Court to review the Secretary's decision not to use the PES method under a non-deferential standard.

SUMMARY OF ARGUMENT

Equal representation is the foundation of our representative democracy. The decennial census is an essential component of the right to equal representation because it is the basis for the apportionment of members to the House of Repre-

sentatives and the drawing of state and local representative districts. Because the census is determinative of equality of voting rights, Art. I, § 2 requires a decennial census that is as accurate as practicable. Thus, the issue presented to this Court is whether the Secretary of Commerce's decision regarding the census, one that impacts directly on the one-person, one-vote principle that this Court has fiercely protected, will be subject to meaningful judicial review.

Amici argue that the census is of such critical importance that its accuracy cannot be left solely to the discretion of the political branches. It must be subject to a greater degree of judicial scrutiny than the "arbitrary and capricious" standard employed by the District Court. To subject the accuracy of the census to meaningful judicial review means that, on remand, the District Court should determine whether the Secretary acted in objective good faith to ensure a census that is as accurate as practicable.

Petitioners argue that such a degree of judicial review is not necessary because the Secretary determined that there was no violation of the constitutional right to equal representation, since, in his view, the adjusted census did not increase distributive accuracy. Amici argue that this critical decision affecting constitutional rights should not be left to the Secretary alone to decide.

Petitioners urge the Court to create a rule of deference so generous as to make the Secretary's decisions largely unreviewable. Amici contend that any census requires value-laden decisions that will have a significant effect on the accuracy of any count. There are three reasons why the courts should be involved in ensuring accuracy. First, the courts' role in analogous contexts shows that the courts can and have proven successful in counterbalancing the majoritarian impulses of the political branches. Prior to *Baker v. Carr,* 369 U.S. 186 (1962) and *Reynolds v. Sims,* 377 U.S. 533 (1964), redistricting decisions by then majoritarian rural legislators failed to sufficiently protect the interests of those living in suburban and urban areas. The involvement of the courts has been critical, and successful, in abolishing those practices.

Second, there is a long-standing history of majoritarian branches of government tolerating an undercount of certain minority citizens. In the census counts, without judicial review, decisions by the executive branch failed to sufficiently protect the interests of blacks, Hispanics and Native Americans. The political branches of government, after five or more decades, have yet to adopt a corrective methodology. Third, because all methodologies, whether using adjusted numbers or unadjusted numbers, contain a myriad of value judgments often masked as "technical," the most effective method of assuring that a count is done as accurately and as value free as possible is to expose the decisions of the political branch to the searching inquiry provided by cross examination and court review.

This Court has long required the government to attempt in good faith to provide the constitutional requirement of equality of representation in a manner that is as accurate as practicable. Because the census directly bears on equal representation, the political branches delegated with the authority to undertake the census must also attempt in good faith to make it as accurate as practicable. Notwithstanding Petitioners' assertions to the contrary, neither Amici nor Respondents are demanding a mathematically precise census or the adoption of impractical methods of calculating the census. However, if the Secretary has at his disposal a practicable method to accurately calculate the census, which also alleviates the historic undercounting of minorities, and fails to adopt such a method, his action cannot be deemed to have been taken in good faith, regardless of his subjective intent. It is undisputed that the PES methodology is practicable and that it corrects the historic undercount of racial and ethnic minorities. What is left for the lower court to decide is whether it provides the most accurate census. Thus, the Court should affirm the Court of Appeals' remand of this case to the District Court to determine if the Secretary chose the method that provides for the most accurate census.

The census data forms the crux of our representational government. It is also used to determine a variety of other

matters affecting the distribution of resources and opportunities. For these reasons, an accurate census is of fundamental importance. It is particularly critical for racial and ethnic minorities, groups that historically have been underrepresented in the political process and which are most in need of sufficient representation and funding. To permit the Secretary's decision not to adjust the census to stand without meaningful judicial review is to acquiesce in the devaluation of certain members of our society. This Court must not permit the continued diminishment of any person's worth in this manner.

I

BECAUSE THE DECENNIAL CENSUS DIRECTLY IMPACTS ON FUNDAMENTAL CONSTITUTIONAL RIGHTS, THE SECRETARY'S DECISION MUST BE SUBJECT TO MEANINGFUL JUDICIAL REVIEW.[2]

A. Because the Decennial Census Directly Affects the Right to Equal Representation, Art. I, § 2 Requires A Census That Is As Accurate As Practicable

The appropriate method by which to determine the most accurate decennial census of the nation's population directly impacts on the fundamental right to equal representation, a right that forms the very core of this country's democracy. Article I, section 2 of the United States Constitution requires allocation of Representatives among the several States "according to their respective numbers." This rule of apportionment was reached after lengthy debate at the Constitutional

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[2] Amici agree with the position of Respondents that the challenge to the Secretary's decision not to use the adjusted census is justiciable, the Census Act does not bar statistical adjustment of the census, and there is no issue with respect to standing, for the reasons enumerated by the District Court and Court of Appeals. *See also Franklin v. Massachusetts*, 112 S. Ct. 2767, 2776 (1992) ("Constitutional challenges to apportionment are justiciable").

Convention of 1787 at which it was decided that a democratic allocation of political power was the only means of establishing a legitimate government. As James Madison succinctly declared, "If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all." 3 The Records of the Federal Convention of 1767 (Farrand ed. 1911) 14; *see also Wesberry v. Sanders*, 376 U.S. 1, 10 (1964). A representative branch of the legislature was therefore created, with the proviso that because the House "should represent 'people,' . . . in allocating Congressmen, the number assigned to each State should be determined solely by the number of the State's inhabitants." *Wesberry*, 376 U.S. at 13.

To ensure that the House of Representatives would be fairly apportioned among the States on a current basis, a periodic census was proposed and adopted into the Constitution. Art. I, § 2, cl. 3; *see also Wesberry*, 376 U.S. at 13 (noting that Framers endorsed proposal of periodic census as means of "assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives"). Accordingly, Art. I, § 2, as amended by the Fourteenth Amendment, requires "counting the whole number of persons in each State" to apportion the correct number of Representatives. The census was employed to guarantee that entrenched interests in the House would not obstruct necessary reapportionment. *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2771 (1992) (*quoting* S. Rep. No. 2, 71st Cong., 1st Sess., 2-3 (1929)) ("The need for [an automatic census] is confessed by the record of the past nine years during which Congress has refused to translate the 1920 census into a new apportionment. . . . As a result, great American constituencies have been robbed of their rightful share of representation.").

In our representative democracy, the complement to the equal apportionment of Representatives among the States is the equal apportionment of Representatives within a State. Equal representation cannot be had if the distribution of Representatives within a State is not equally divided because each person's vote would not have equal power. *See Wesberry*, 376

U.S. at 7-8 (in striking down apportionment of congressional seats based on wildly divergent districts, Court noted that the "Constitution's plain objective was that of making equal representation for equal numbers of people the fundamental goal"). The decennial census directly impacts upon the right to equal representation, embodied in the one-person, one-vote rule, because it is the basis upon which congressional districts within a state are drawn. The one-person, one-vote principle, which this Court has jealously guarded, is acutely affected by a less than accurate census because the distribution of Representatives within a State will not be accurately made. *See Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (because the census count is the best population data available, "it is the only basis for good faith attempts to achieve population equality").

The danger that inaccuracies in the census will result in unequal congressional districts within a State is particularly acute in states with districts that have a high concentration of minority residents, as the census severely undercounts minorities by as much as 5 percent. This places the burden of underrepresentation squarely on the shoulders of those persons who have the least power in the political process and consequently the greatest need for adequate representation. Furthermore, in such a district, the votes of the citizens would not have weight equal to that of other districts, and the constitutional goal of equal representation for equal numbers would not be met. As this Court noted in *Reynolds v. Sims*, the "right of suffrage can be denied by . . . dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 554, 555 (1964).

Because the decennial census mandated by the Constitution lies at the heart of our representative democracy, Art. I, § 2 requires that the decennial census be as accurate as practicable. *See Franklin*, 112 S. Ct. at 2785 (Stevens, J., concurring) (noting that the statutory command of Art. I, § 2 "embodies a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the

apportionment"); *Karcher*, 462 U.S. at 731 ("Adopting any standard other than population equality, *using the best census data available*, would subtly erode the Constitution's ideal of equal representation."). (Emphasis added).[3] Only an accurate census can ensure the right to equal representation through the one-person, one-vote principle. The close relationship between the census and the allocation of Representatives among the states and within a state therefore requires that decisions affecting the census be held to the same good-faith standard as those bearing on congressional districting. As the Court of Appeals declared below, the "federal government, no less than the states, is required to make a good-faith effort to achieve the Constitution's plain objective of equal representation." *City of New York v. U.S. Dept. of Commerce*, 34 F.3d at 1129.

B. An Accurate Decennial Census Is Crucial Because It Affects The Allocation Of Federal Funds, Resources and Opportunities

An accurate decennial census is also of fundamental importance because census data is used for myriad purposes, which, although not directly implicating constitutional rights, are essential. These purposes include the allocation of federal funds to states, cities and school districts for education, health, transportation, housing, community services, and job training. The census is also used to determine the just implementation of federal programs.[4] It constitutes "one of the most important sources of U.S. data for basic and applied social

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[3] The Federal Petitioners concede this requirement in their brief when they state that Congress has a "constitutional responsibility to make an actual enumeration of the population." (Brief of Federal Petitioners, at 28).

[4] Some instances where census data are used for federal funding and programs include the following:

- The Voting Rights Act requires the collection of census data to determine the implementation of bilingual voting programs to protect the rights of language minorities.

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research"; areas of research that utilize census data include race relations, the criminal justice system, education, poverty and the aging of the population.[5] In addition, census data serves many business uses, including the determination

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- The Elementary and Secondary Education Act specifically mandates that the U.S. census collect data on the poverty status of school-age children for the purpose of allocating funds to school districts.
- The Bureau of Economic Analysis relies on census data to develop income estimates for regional, state and local areas, which estimates, in turn, are used in funding formulas that allocate federal funding for Medicaid and AFDC.
- The Department of Agriculture obtains census data by state and county to determine the number of women, children and infants whose families have incomes below the maximum income limit for the Special Supplemental Nutrition Program for Women, Infants and Children (WIC).
- The Department of Justice, Immigration and Naturalization Service uses census data to plan and evaluate immigration policy.
- The Equal Employment Opportunity Commission uses census labor force data to analyze statistical evidence in class action charges of employment discrimination.
- The Department of Transportation uses census data to monitor compliance with the Federal Transit Act and the Americans with Disabilities Act.
- The Department of Agriculture uses census data to allocate grant funds and determine loan interest rates for assistance programs.

Modernizing the U.S. Census 24, 444 (Barry Edmonston and Charles Schultze, eds., National Research Council, Committee on National Statistics). This list represents only a fraction of the federal funds and federal programs that rely on the decennial census data.

[5] *Id.* at 259.

of where to construct hospitals and health clinics and the placement within communities of banks, other financial institutions, and community service providers.[6]

Since the decennial census affects the allocation of federal and state funds, resources and opportunities, it is imperative that the census be as accurate as practicable.

C. Meaningful Review By The Courts Is Necessary To Ensure That The Most Accurate Means of Computing The Census Is Used

Art. I, § 2's "high standard of justice and common sense" — "equal representation for equal numbers of people," *Karcher,* 462 U.S. at 730 — is breached when the census by which Representatives are to be apportioned is found to be inaccurate. Because an accurate census directly bears on the fundamental constitutional right of equal representation, critical decisions concerning its accuracy must be subject to meaningful judicial review.

As the Court of Appeals correctly noted, the Secretary's decision not to use the adjusted census should be reviewed under a more meaningful standard than the arbitrary and capricious test. Rather, because an accurate census represents the keystone to our constitutional democracy and to the "equal right to vote" secured by Article I, § 2, the Secretary's decision must be subjected to an exacting standard of judicial scrutiny. As the long history of cases involving apportionment and the right to vote has proven, this Court has repeatedly seen that political branches do yield to the temptation to undercount those not in the majority, whether geographically or ethnically. The Court has therefore indicated that deference to political branches is not warranted when a constitutional right is at stake. *See, e.g., Baker v. Carr,* 369 U.S. 186 (1962) (rejecting Tennessee legislators' contention that apportionment should not be reviewed by the courts); *Gray v. Sanders,* 372 U.S. 368 (1963) (invalidating Georgia primary system which gave greater weight to rural votes than urban votes); *Wesberry v. Sanders,* 376 U.S. 1 (1964) (confirming concept that right to vote

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[6] *Id.* at 292-300.

is "too important in our free society to be stripped of judicial protection" by precluding judicial review of state congressional apportionment schemes); *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down an Alabama scheme that created wildly disparate state legislative districts); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (holding that Missouri congressional redistricting plan creating disparate districts did not meet the "as nearly as practicable" constitutional standard); *Karcher v. Daggett*, 462 U.S. 725 (1983) (rejecting New Jersey's congressional districting plan in which districts varied by size by less than 1% because the plan failed to meet a "good-faith" standard of equality). This Court's insistence on a judicial role in these cases has been phenomenally successful in protecting the right of all people to an equal say in government.

These cases demonstrate that independent review by the Court is essential for the meaningful implementation of important constitutional rights. *See also Sable Communications v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications v. Virginia*, 435 U.S. 829, 843 (1978). As explained above, because the decennial census is the basis upon which states create congressional districts, an inaccurate census affects the one-person, one-vote principle just as acutely as when districts are widely skewed or when reapportionment is refused. Because equal representation cannot be had without an accurate census, this Court should not recoil from exercising its independent review here, just as it did not hesitate to intervene to ensure the continued health of the one-person, one-vote principle in the redistricting cases. The one-person, one-vote mandate will have little meaning if the underlying census is not as accurate as practicable.

There is an additional, powerful reason for meaningful review in this case. The decision by the Secretary of Commerce has a serious and adverse impact upon racial and ethnic minorities—groups that have traditionally needed judicial protection from the majority. Undercounting certain members of the population—in essence, denying their existence—is especially noxious when it disproportionately and negatively affects racial and ethnic minorities who have histori-

cally been prevented from full participation in the political process. H.R. Rep. No. 439, 89th Cong., 1st Sess., report at 1965 U.S.C.C.A.N. 2437 (legislative history of Voting Rights Act of 1965 noted long history of discrimination against African-Americans in the political process and the need for judicial intervention in striking down discriminatory policies due in part to the intransigence of elected officials). Within our constitutional system, the judiciary has long served as the institution designed to counter and to ameliorate the excesses of pure majoritarianism. *See, e.g., Plyler v. Doe,* 457 U.S. 202 (1982) (invalidating state law denying education to children of illegal aliens); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (striking state law requiring recipients of welfare assistance to reside in state for at least one year). So understood, this Court has long recognized the responsibility of the judiciary to protect minority interests in circumstances where the decisions of the political branches of government skew outcomes unfairly in the interests of the dominant majority. *See Reynolds v. Sims,* 377 U.S. 533 (1964); *Wesberry v. Sanders,* 376 U.S. 1, 10 (1964); *Gray v. Sanders,* 372 U.S. 368 (1963) (invalidating Georgia primary system giving greater voting power to rural residents than urban residents); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (invalidating gerrymandering of districts favoring white majority).

While equal protection claims challenging racial classifications require proof of intentional discrimination, *see Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097 (1995); *Washington v. Davis,* 426 U.S. 229 (1976), and no such claim is presented here, this Court need not be totally blind to the disproportionate undercount of African-Americans, Hispanics, and Native Americans for purposes of evaluating the Article 1, § 2 claim.[7] While the right to a census that is as "accurate as practicable" is one of general application, its trans-

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[7] Amici do not argue that the Court should depart from its established approach to equal protection analysis for purposes of evaluating claims of racial discrimination. While the Court of Appeals referred to the racially

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gression has a particular impact upon minority groups. Already often submerged within the political process, minority groups bear other difficulties when they are not counted in the most effective manner in the census process.

Judicial review is also required because the recipients and beneficiaries of federal funds and programs affected by the census are, to a large extent, racial and ethnic minorities. Thus, there is a danger that the use of a less than accurate census may deprive those most in need of funding and assistance as well as dilute their voting power.

Federal Petitioners have conceded that the census disproprotionately and negatively impacts on racial and ethnic minorities. The Secretary admitted that the census historically has undercounted minorities to a far greater extent than for non-minorities; for African-Americans and Hispanics, the census undercounted the population more than twice as much as the undercount for whites. The Census Bureau clearly considered the undercount to be significant; as the Bureau Director declared in recommending adjustment to the decennial census, "[i]t is time to correct this historical problem [of undercounting minorities]. . . .With the increasing diversity of the country . . . the problem could be larger in 2000." The Secretary also admitted that the Bureau had created a methodology that would finally end the historic undercount and provide a more accurate count of minorities in the United States.

Undercounting the national population is a significant concern. As the Bureau Director stated in her recommendation to use the adjusted census, "not adjusting would be denying that . . . 5 million persons exist. That denial would be a greater inaccuracy than any inaccuracies that adjustment may introduce." When the undercount disproportionately affects

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disproportionate impact of the failure to utilize the adjusted census, this case can be resolved under Article I, § 2. Thus, while minorities may have a particular interest in insuring that Art. I, § 2 is enforced, they need not make out a claim of discriminatory intent to protect that interest.

racial and ethnic minorities who have long been underrepresented in the political process, it is particularly grave. That the government would choose not to employ a method that would correct the historic undercount simply to maintain a "200 year tradition of counting people" is offensive and the message it imparts—minorities are not important enough to be counted—must not be countenanced.

The Federal Petitioners concede that meaningful judicial review would be required if the Secretary's decision had a negative impact on the constitutional guarantee of equal representation: "[a]bsent unequivocal evidence that an adjustment would have improved the distributive accuracy of the census, there is no constitutional basis upon which a court could set aside the Secretary's determination that no adjustment was warranted." (Brief at 24). However, federal appellants contend that judicial review is not mandated here because no constitutional right was implicated. They base this argument on the Secretary's decision that, in his view, distributive accuracy was not improved by adjusting the census and that therefore the right to equal representation was not affected. In effect, Petitioners would have this Court abdicate its role of determining whether a constitutional violation occurred to the Secretary's conclusion that no constitutional rights were violated. Amici disagree with this position for two reasons. First, Amici do not concede that the adjusted census would not improve distributive accuracy. The accuracy of the PES method is the question to be determined by the lower court on remand. More importantly, the determination of whether a constitutional right has been violated cannot be left within the discretion of the political branches. Rather, that is precisely the type of issue for the courts to decide.

The federal appellants also spend a great portion of their brief outlining the so-called technical questions that arise when adjustment is made in an effort to make them appear hopelessly technical and unfathomable by a non-statistician. The paradigmatic example of that effort is the discussion of "smoothing," the process by which the Bureau avoided

overadjusting. However, there was extensive testimony at trial about the "smoothing" process and, contrary to the government's suggestions, the District Court appeared perfectly capable of understanding the process and the assumptions on which it is based. More importantly, the government's argument implicitly suggests that difficult technical questions arise only when the adjustment methodology is used. That is incorrect. Value judgments and technical issues are imbedded in every decision made with respect to the use of the nonadjusted census. The government's proposed distinction between redistricting cases and unadjusted census counts on the one hand, which the government asserts involve simple arithmetic, and adjusted census counts on the other, which involves extremely technical questions, is both false and inappropriate in constitutional analysis. The degree of protection afforded ought not to depend on the difficulty of the factual questions involved.

The question is not whether technical questions abound or whether technical decisions can mask manipulation designed to favor particular groups. The question is what process is most likely to ensure that the manipulation does not occur and that facially technical decisions are not used manipulatively. In our view, meaningful judicial review is that process for three reasons. First, the open nature of court decision-making, with public trials, will better deter manipulation and guarantee accuracy than decisions made in private in executive offices. Second, the nature of court proceedings, with discovery and cross-examination, is particularly suited to teasing out and challenging hidden assumptions or masked manipulation. Third, the history of the failure of majoritarian executive and legislative branch decision-making in ensuring voting equality, and the success of court involvement in that context, demonstrates that courts have an important role to play in assuring that those branches of government do not ignore, or affirmatively manipulate, facts important to minorities, whether racial and ethnic minorities, geographic minorities, or others.

The Federal Petitioners attempt to steer this Court away from reviewing the Secretary's decision by declaring that resolution of the statistical dispute in this case "involves an exercise of technical expertise that lies uniquely within the competence of [the executive branch]." (Brief at 33). This argument is wrong for two reasons. First, courts routinely engage in technical analysis in resolving disputes of all kinds. Furthermore, the Commerce Secretary, who is admittedly not a statistician, did not perform technical analyses himself but rather relied on the judgment of various experts in reaching his decision. Second, the Secretary did not rely on his own technical advisors, the Bureau of the Census (the agency empowered by Congress to conduct the census), in reaching his decision. Rather, he rejected the Bureau's strong recommendation in favor of the adjusted census and based his decision on a number of non-technical grounds, including the preservation of the traditional method of census calculation. Thus, Petitioners' argument that this conflict is too technical for courts to determine is belied by the Secretary's own actions.

When constitutional interests are at stake, courts must not abdicate their traditional responsibility of ensuring that those interests are protected. As this Court eloquently stated in Reynolds, "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." 377 U.S. at 566, 84 S. Ct. at 1384.

D. The District Court Must Determine Whether The Commerce Secretary Acted In Good Faith To Ensure A Census That Is As Accurate As Practicable

The constitutional mandate set by Art. I, § 2 that equal representation be afforded for equal numbers requires an objective good faith effort by the political branches to achieve population equality as nearly as is practicable. *Karcher*, 462 U.S. at 730, 103 S. Ct. at 2658 *(citing Kirkpatrick v. Preisler*, 394 U.S. at 530-531, 89 S. Ct. at 1228, 1229). Because the decennial census, as discussed above, directly impacts upon the right to equal representation, *Karcher's* good faith standard applies with equal force to the Secretary's decisions con-

cerning the census. The good faith standard is an objective one. In this context it would have been met only if the Secretary chose a method of calculating the census that was as accurate as practicable.[8] Where there is a practicable method of accurately calculating the census, the Secretary must elect to use such a method. His decision not to does not meet the standard of good faith, regardless of his subjective intent.

The good faith standard and the practicable accuracy requirement are two sides of the same coin: they are concepts created in the recognition that precise mathematical precision in the equal representation context is impossible and that certain practical considerations have to be taken into account. *See Karcher v. Daggett*, 462 U.S. 725, 730 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). While there are clearly impractical methods of determining the census that could hypothetically result in a perfect count of the population, those methods are not required by *Karcher's* good-faith standard, and Amici do not argue that the Secretary should consider them. Instead, Amici contend that because the Secretary was provided with an indisputably practicable alternative to the traditional means of taking the census, namely, the PES method, the only question that remains in the good-faith analysis is whether the PES method provides the most accurate census. If it is determined by the District Court upon remand that the PES method provides a more accurate census, then the Secretary's failure to use that method violated his good-faith obligation to ensure

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[7] Petitioners argue that *Karcher's* good faith requirement is inapplicable to the census and apportionment process because disparities between State districts would be of a "magnitude that would be unacceptable in the context of [intra]state districting policy." (Brief at 40, n. 30). This argument is untenable. Neither the Court of Appeals nor Amici expect an absolutely precise census. What the appeals court held, and what Amici argue, is that the federal government must make a good-faith effort to achieve a census and apportionment that is as accurate as possible. As the Court of Appeals declared, "[t]he impossibility of achieving precise mathematical equality is no excuse for not making this mandated good-faith effort." 34 F.3d at 1129.

equal representation and his decision not to use the adjusted census must be overturned. If it is determined that the PES method does not provide a more accurate census, then the Secretary acted in good faith in electing not to use it, because the unadjusted method provided a census that was as accurate as practicable.

Amici do not concede that the unadjusted census provides a more accurate count of the nation's population. Furthermore, if the PES methodology provides at least as distributively accurate a count as the unadjusted census and alleviates the historic undercount of racial and ethnic minorities, the Secretary's failure to use the adjusted census does not meet the good faith standard. The use of data that, by all accounts, historically undercounts racial and ethnic minorities is simply wrong. There is no rationale for its continued use if an equally accurate and more just method exists.

CONCLUSION

For these reasons, this Court should affirm the Second Circuit's remand to the District Court for review of the Secretary's decision not to use the adjusted census under the standards stated above.

Dated: New York, New York
December 8, 1995

Respectfully submitted,

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